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PRINCIPAL ABBREVIATIONS

AA	VATICAN II, Decree on the Apostolate of Lay People, *Apostolicam actuositatem*, November 18, 1965, *AAS* 59 (1966) 837–864
AAS	*Acta Apostolicae Sedis: commentarium officiale*
AG	VATICAN II, Decree on the Church's Missionary Activity, *Ad gentes*, December 7, 1965, *AAS* 58 (1966) 947–990
AIE	SACRED CONGREGATION FOR RELIGIOUS AND SECULAR INSTITUTES, Decree *Ad instituenda experimenta*, June 4, 1970, *AAS* 62 (1970) 549–550
AkK	*Archiv für katholisches Kirchenrecht*, Mainz, 1857–
Alloc.	Allocution
AP	Apostolic Penitentiary
AP	PAUL VI, motu propio *Ad pascendum*, August 15, 1972, *AAS* 64 (1972) 534–540
Ap.	Apostolic
Ap. Const.	Apostolic Constitution
Ap. Exhort.	Apostolic Exhortation
art. / arts.	article / articles
AS	PAUL VI, motu proprio *Apostolica sollicitudo*, September 15, 1965, *AAS* 57 (1965) 775–780
BB	*Benedicti Papae XIV Bullarium*, Venice 1768
Bk.	Book
BM	*Bibliographia missionaria*
BOCEE	*Boletín Oficial de la Conferencia Episcopal española*
BOEE	*Boletín Oficial del Estado español*
BRC	*Bullarii Romani Continuatio, Romae 1835–1855*
C	*Causa* (*Decreti pars secunda*)
c. / cc.	canon / canons
CA	PIUS XII, motu proprio *Crebrae allatae*, February 22, 1949, *AAS* 31 (1949) 89–117
CAd	SECRETARIAT OF STATE, Rescript *Cum admotae*, November 6, 1964, *AAS* 59 (1967) 374–378

CAn	JOHN PAUL II, Encyclical *Centesimus annus*, May 1, 1991, *AAS* 83 (1991) 793–867
CB	Congregation for bishops
CBA	Conference of bishops of Argentina
CBF	Conference of bishops of France
CBI	Conference of bishops of Italy
CBM	Conference of bishops of Mexico
CBP	Conference of bishops of Portugal
CBS	Conference of bishops of Spain
CC	Congregation for the Clergy
CC	PIUS XI, Encyclical *Casti connubii*, December 31, 1930, *AAS* 22 (1930) 539–592
CCC	*Catechism of the Catholic Church*, Canadian Conference of Catholic bishops, Ottawa, 2000
CCCL	Central Commission for the Coordination of the Work of the Council and for Interpreting the Conciliar Decrees
CCE	Congregation for Catholic Education
CCEO	*Codex canonum Ecclesiarum orientalium*, 1990
CCh	*Corpus Christianorum*: SL (Series Latina), SG (Series Graeca). Turnhout-Paris 1953 ss.
CCS	Congregation for the Causes of Saints
CD	VATICAN II, Decree on the Pastoral Office of bishops in the Church, *Christus Dominus*, October 28, 1965, *AAS* 58 (1966) 673–696
CDF	Congregation for the Doctrine of the Faith
CDRC	Commission for the Discipline of the Roman Curia
CDWDS	Congregation for Divine Worship and the Discipline of the Sacraments
CE	PAUL VI, motu proprio *Catholica Ecclesia*, October 23, 1976, *AAS* 68 (1976) 694–696
CEC	Congregation for the Eastern Churches
CEP	Congregation for the Evangelization of Peoples
cf.	confer
ch.	chapter
CIC	*Codex iuris canonici*, 1983
CIC/1917	*Codex iuris canonici*, 1917
CICLSAL	Congregation for Institutes of Consecrated Life and Societies of Apostolic Life
CICSL	Consilium for the Implementation of the Constitution on the Sacred Liturgy
CL	JOHN PAUL II, Apostolic Exhortation *Christifideles laici*, December 30, 1988, *AAS* 81 (1989) 393–521
Clem.	*Clementinae*

CM	PAUL VI, motu proprio *Causas matrimoniales*, March 28, 1971, *AAS* 63 (1971) 441–446
CMat	PAUL VI, motu proprio *Cum matrimonialium*, September 8, 1973, *AAS* 65 (1973) 577–581
CodCom	Pontifical Commission for the Authentic Interpretation of the Canons of the Code of Canon Law
col. / cols.	column / columns
Collectanea	*Collectanea S. Congregationis de Propaganda Fide*, Romae 1907
Comm	Communicationes
Communionis notio	CONGREGATION FOR THE DOCTRINE OF THE FAITH, *Letters to the bishops of the Catholic Church about Certain Aspects of the Church as Communion*, May 28, 1992, *AAS* 85 (1993) 838–850
Comp. I (II ...)	*Compilatio prima* (*secunda*, etc.)
Congr.	Congregation
Const.	Constitution
CPAC	Council for the Public Affairs of the Church
CS	PAUL VI, motu proprio *Cleri sanctitati*, June 2, 1957, *AAS* 49 (1957) 433–600
CSan	SACRED CONGREGATION FOR RELIGIOUS, Instruction *Cum Sanctissimus*, March 19, 1948, *AAS* 40 (1948) 293–297
CSEL	*Corpus scriptorum ecclesiasticorum latinorum*, Viena 1866 ss.
CT	JOHN PAUL II, Apostolic Exhortation *Catechesi tradendae*, October 16, 1979, *AAS* 71 (1979) 1277–1340
D.	*Distinctio (Decreti pars prima; De poen.; De cons.)*
DCV	*Documenta inde a Concilio Vaticano II expleto edita* (1966–1985), Vatican City 1985
De poen.	*Tractatus de poenitentia* (C. 33, q. 3)
De cons.	*De consecratione (Decreti pars tertia)*
DE	*Il Diritto ecclesiastico*
DE/1967	SECRETARIAT FOR PROMOTING CHRISTIAN UNITY, *Ecumenical Directory*, I: May 14, 1967, *AAS* 59 (1967) 574–592; II: April 16, 1970, *AAS* 62 (1970) 705–724
DE/1993	PONTIFICAL COUNCIL FOR PROMOTING CHRISTIAN UNITY, *Directory for the Application of the Principles and Norms on Ecumenism*, March 23, 1993, *AAS* 85 (1993) 1039–1119
Decl.	Declaration
Decr.	Decree
DH	VATICAN II, Declaration on Religious Liberty, *Dignitatis humanae*, December 7, 1965, *AAS* 58 (1966) 929–946
DI	*Dilexit iustitiam*, Vatican City 1984
dict. p. c.	Dictum Gratiani post capitulum
Dir.	Directory

DPM	John Paul II, Apostolic Constitution *Divinus perfectionis Magister*, January 25, 1983, *AAS* 75 (1983) 349–355
DPMB	Sacred Congregation for bishops, *Directory on the Pastoral Ministry of bishops* (*Ecclesiae imago*), February 22, 1973, Typis polyglottis Vaticanis 1973
DR	Pius XI, Encyclical *Divini Redemptoris*, March 19, 1937, *AAS* 29 (1937) 65–106
DSD	Pius XI, Apostolic Constitution *Deus scientiarum Dominus*, May 24, 1931, *AAS* 23 (1931) 241–262
DV	Vatican II, Dogmatic Constitution on Divine Revelation, *Dei Verbum*, November 18, 1965, *AAS* 58 (1966) 817–835
Dz.-Sch	DENZINGER-SCHÖNMETZER, *Enchiridion Symbolorum, Definitionum et Declarationum de rebus fidei et morum*, ed. 33.[a], 1965
EcS	Paul VI, Encyclical *Ecclesiam Suam*, August 6, 1964, *AAS* 56 (1964) 609–659
EDIL	*Enchiridion Documentorum Instaurationis Liturgicae* (R. Kaczynski, ed.), Torino-Roma 1976–1993
EFH	*Enchiridion fontium historiae ecclesiasticae antiquae* (C. Kirch, ed.)
EIC	Ephemerides iuris canonici
EM	Paul VI, motu proprio *De Episcoporum muneribus*, June 15, 1966, *AAS* 58 (1966) 467–472
EMys	Sacred Congregation for Rites, Instruction *Eucharisticum mysterium*, May 25, 1967, *AAS* 59 (1967) 539–573
EN	Paul VI, Apostolic Exhortation *Evangelii nuntiandi*, December 8, 1975, *AAS* 68 (1976) 5–76
Enc.	Encyclical
EP	Sacred Congregation for the Doctrine of the Faith, Decree *Ecclesiae Pastorum*, March 19, 1975, *AAS* 67 (1975) 281–284
ES	Paul VI, motu proprio *Ecclesiae sanctae*, August 6, 1966, *AAS* 58 (1966) 757–787
ET	Paul VI, Apostolic Exhortation *Evangelica testificatio*, June 29, 1971, *AAS* 63 (1971) 497–526
EV	*Enchiridion Vaticanum*. Edizioni Dehoniane, Bologna 1966–2001
Exhort.	Exhortation
Extrav. com.	*Extravagantes communes*
Extrav. Io. XXII	*Extravagantes Ioannis XXII*
FC	John Paul II, Apostolic Exhortation *Familiaris consortio*, November 22, 1981, *AAS* 74 (1982) 81–191
ff	following
Fontes	P. Gasparri and A. Serédi, eds., *Codicis Iuris Canonici Fontes*, Rome 1923–1939

GCD	SACRED CONGREGATION FOR CLERGY, *General Catechetical Directory,* April 11, 1971, *AAS* 64 (1972) 97–176
GE	VATICAN II, Declaration on Christian Education, *Gravissimum educationis,* October 28, 1965, *AAS* 58 (1966) 728–739
gen.	general
GER	*Generale Ecclesiae Rationarium,* June 28, 1988
GILH	General Instruction of the Liturgy of the Hours
GIRM (1970)	General Instruction of the Roman Missal, March 26, 1970
GIRM (2000)	General Instruction of the Roman Missal, Canadian Conference of Catholic bishops, Ottawa
gl.	*glossa*
Glos. ord.	*Glossa ordinaria*
GS	VATICAN II, Pastoral Constitution on the Church in the Modern World, *Gaudium et spes*, December 7, 1965, *AAS* 58 (1966) 1025–1115
HCW	Rite of Holy Communion and Worship of the Eucharistic Mystery Outside Mass
Hom.	Homily
HV	PAUL VI, Encyclical *Humanae vitae*, July 25, 1968, *AAS* 60 (1968) 481–503
IC	SACRED CONGREGATION FOR THE DISCIPLINE OF THE SACRAMENTS, Instruction *Immensae caritatis*, January 29, 1973, AAS 65 (1973) 264–271
ICL	Institute of consecrated life
ID	SACRED CONGREGATION FOR SACRAMENTS AND DIVINE WORSHIP, INSTRUCTION *Inaestimabile donum*, April 3, 1980, AAS 72 (1980) 331–343
IE	*Ius Ecclesiae*
IM	VATICAN II, Decree on the Means of Social Communication, *Inter mirifica*, December 4, 1963, *AAS* 56 (1964) 145–157
Ind.	Indult
Instr.	Instruction
IOe	SACRED CONGREGATION FOR RITES, Instruction *Inter Oecumenici*, September 26, 1964, *AAS* 56 (1964) 877–900
ITC	International Theological Commission
l.s.	*Latae sententiae*
LE	*Leges Ecclesiae post Codicem iuris canonici editae* (X. Ochoa, ed.), Rome 1966–1994
LEF	*Lex Ecclesiae fundamentalis*
Let.	Letter (*epistula*)
LG	VATICAN II, Dogmatic Constitution on the Church, *Lumen gentium*, November 21, 1964, *AAS* 57 (1965) 5–75
Litt.	Letter (*litterae*)

LMR	SACRED CONGREGATION FOR RELIGIOUS AND SECULAR INSTITUTES, *Life and Mission of Religious in the Church* (Plenaria of SCRSI), August 20, 1980
MBR	*Magnum Bullarium Romanum*, Graz 1964–1966
MC	PIUS XII, Encyclical *Mystici Corporis*, June 29, 1943, *AAS* 35 (1943) 193–248
MD	PIUS XII, Encyclical *Mediator Dei*, November 20, 1947, *AAS* 39 (1947) 521–600
ME	Monitor ecclesiasticus
MeM	JOHN XXIII, Encyclical *Mater et Magistra* May 15, 1961, *AAS* 53 (1961) 401–464
MF	PAUL VI, Encyclical *Mysterium fidei*, September 3, 1965, *AAS* 57 (1965) 753–774
MG	PAUL VI, Allocution *Magno gaudio*, May 23, 1964, *AAS* 56 (1964) 565–571
MM	PAUL. VI, motu proprio *Matrimonia mixta*, March 31, 1970, *AAS* 62 (1970) 257–263
MP/mp	*Motu proprio*
MQ	PAUL VI, motu proprio *Ministeria quaedam*, August 15, 1972, *AAS* 64 (1972) 529–534
MR	SACRED CONGREGATION FOR RELIGIOUS AND SECULAR INSTITUTES AND SACRED CONGREGATION FOR BISHOPS, Directive Notes *Mutuae relationes*, May 14, 1978, *AAS* 70 (1978) 473–506
MS	SACRED CONGREGATION FOR THE DOCTRINE OF THE FAITH, Instruction *Matrimonii sacramentum*, March 18, 1966, *AAS* 58 (1966) 235–239
NAE	VATICAN II, Declaration on the Relation of the Church to Non-Christian Religions, *Nostra aetate*, October 28, 1965, *AAS* 58 (1966) 740–744
no. / nos.	number / numbers
Notif.	Notification
NPCEM	COUNCIL FOR THE PUBLIC AFFAIRS OF THE CHURCH, *Norms for the Promotion of Candidates to the Episcopal Ministry in the Latin Church*, March 25, 1972, *AAS* 64 (1972) 386–391
NSRR	*Norms of the Tribunal of the Sacred Roman Rota*: (1934) June 29, 1934, *AAS* 26 (1934) 449–491 (1969) May 27, 1969, Typis polyglottis Vaticanis 1969 (1982) January 16, 1982, *AAS* 74 (1982) 490–517
OChr	SACRED CONGREGATION FOR CLERGY, Circular Letter *Omnes christifideles*, January 25, 1973
OE	VATICAN II, Decree on the Eastern Catholic Churches, *Orientalium Ecclesiarum*, November 21, 1964, *AAS* 57 (1965) 76–89
OR	*L'Osservatore romano*
Ord	Ordinary

OS (1966)	SECRETARY OF STATE, *Order of the Celebration of the Synod of bishops*, December 8, 1966, *AAS* 59 (1967) 91–103
OS (1969)	COUNCIL FOR THE PUBLIC AFFAIRS OF THE CHURCH, *Order of the Celebration of the Synod of bishops*, June 24, 1969, *AAS* 61 (1969) 525–539
OS (1971)	COUNCIL FOR THE PUBLIC AFFAIRS OF THE CHURCH, *Order of the Celebration of the Synod of bishops*, August 20, 1971, *AAS* 63 (1971) 702–704
OT	VATICAN II, Decree on the Training of Priests, *Optatum totius*, October 28, 1965, *AAS* 58 (1966) 713–727
PA	SACRED CONSISTORIAL CONGREGATION, Directive Notes *Postquam Apostoli*, March 25, 1980, *AAS* 72 (1980) 343–364
Paen	PAUL VI, Apostolic Constitution *Paenitemini*, February 17, 1966, *AAS* 58 (1966) 177–185
Pamplona Com	*Código de Derecho Canónico, bilingüe y anotada*, Pamplona, 5th ed. 1992; 6th ed. 2001; *Code of Canon Law Annoted*, 2nd ed., Montreal, 2004.
Part.	Particular
PB	JOHN PAUL II, Apostolic Constitution *Pastor bonus*, June 28, 1988, *AAS* 80 (1988) 841–912
PBC	Pontifical Biblical Commission
PC	VATICAN II, Decree on the Up-to-Date Renewal of Religious Life, *Perfectae caritatis*, October 28, 1965, *AAS* 58 (1966) 702–712
PCC	Pontifical Council for Culture
PCCICOR	Pontifical Commission for the Revision of the Eastern Code of Canon Law
PCCICR	Pontifical Commission for the Revision of the Code of Canon Law
PCCU	Pontifical Council *Cor unum*
PCDNB	Pontifical Council for Dialogue with Non-Believers
PCED	Pontifical Commission *Ecclesia Dei*
PCF	Pontifical Council for the Family
PCHW	Pontifical Council for Pastoral Assistance to Health Care Workers
PCID	Pontifical Council for Inter-religious Dialogue
PCIDSVC	Pontifical Commission for the Interpretation of the Decrees of the Second Vatican Council
PCILT	Pontifical Council for the Interpretation of Legislative Texts; now: Pontifical Council for Legislative Texts
PCJP	Pontifical Council for Justice and Peace
PCL	Pontifical Council for the Laity
PCPCMIP	Pontifical Council for the Pastoral Care of Migrants and Itinerant
PCPCU	Pontifical Council for Promoting Christian Unity

PCSC	Pontifical Council for Social Communications
PCSCM	Pontifical Council for Social Communications Media
PDV	JOHN PAUL II, Apostolic Exhortation *Pastores dabo vobis*, March 25, 1992, *AAS* 84 (1992) 657–804
pen	Preliminary explanatory note
Per	*De religiosis et missionariis supplementa et monumenta periodica*, 1–8 (1907–1919) *Periodica de re canonica et morali*, 9–15 (1921–1926) *Periodica de re morali, canonica, liturgica*, 16–79 (1927–1990) *Periodica de re canonica*, 80 (1991)
PF	PIUS XII, motu proprio *Primo feliciter*, March 12, 1948, *AAS* 40 (1948) 283–286
PG	*Patrologiae cursus completus*. Series graeca. (J.-P. Migne, ed.), Paris 1857–1886
PI	Instruction *Potissimum institutioni*, February 2, 1990, *AAS* 82 (1990) 472–532
PL	*Patrologiae cursus completus*. Series latina. (J.-P. Migne, ed.), Paris 1844–1864
PM	PAUL VI, motu proprio. *Pastorale Munus*, November 30, 1963, *AAS* 56 (1964) 5–12
PME	PIUS XII, Apostolic Constitution *Provida Mater Ecclesia*, February 2, 1947, *AAS* 39 (1947) 114–124
PO	VATICAN II, Decree on the Ministry and Life of Priests, *Presbyterorum ordinis*, December 7, 1965, *AAS* 58 (1966) 991–1024
Prae	Praenotanda
Principles	*Principles Governing the Revision of the Code of Canon Law*, *Communicationes* 1 (1969) 77–86
PrM	SACRED CONGREGATION FOR THE DISCIPLINE OF THE SACRAMENTS, Instruction *Provida Mater*, August 15, 1936, *AAS* 28 (1936) 313–361
PS	SACRED CONSISTORIAL CONGREGATION, Circular Letter *Presbyteri sacra*, April 11, 1970, *AAS* 62 (1970) 459–465
pt.	part
q.	question
QA	PIUS XI, Encyclical *Quadragessimo anno*, May 15, 1931, *AAS* 23 (1931) 177–228
QSR	Quaderni Studio rotale
RA	Rite of Anointing, December 7, 1972
RBaptC (1969)	Rite of Baptism of Children, June 10, 1969;
RBaptC (1973)	Rite of Baptism of Children, Ed. typica altera, August 29, 1973
RC	SACRED CONGREGATION FOR RELIGIOUS AND SECULAR INSTITUTES, Instruction *Renovationis causam*, January 6, 1969, *AAS* 61 (1969) 103–120

RCIA	Rite of Christian Initiation of Adults, January 1, 1972
RConf	Rite of Confirmation, August 22, 1971
RDCA	Rite of Dedication of a Church and an Altar, May 29, 1977
REDC	*Revista española de derecho canónico*
Rescr.	Rescript
Resol.	Resolution
Resp.	Response
REU	PAUL VI, Apostolic Constitution *Regimini Ecclesiae universae,* August 15, 1967, *AAS* 59 (1967) 885–928
RF	Rite of Funerals, August 15, 1969
RFIS	SACRED CONGREGATION FOR CATHOLIC EDUCATION, *Ratio fundamentalis institutionis sacerdotalis,* January 6, 1970, *AAS* 62 (1970) 321–384; Editio altera, March 19, 1985, Typis polyglottis Vaticanis 1985
RGCR	*Regolamento generale della Curia Romana,* February 4, 1992, *AAS* 84 (1992) 201–267
RH	JOHN PAUL II, Encyclical *Redemptor hominis,* March 4, 1979: *AAS* 71 (1979) 257–324
RM	JOHN PAUL II, Encyclical *Redemptoris Missio,* December 7, 1990, *AAS* 83 (1991) 249–340
RM (1969)	Rite of Marriage, March 19, 1969
RM (1990)	Rite of Marriage, March 19, 1990
RN	LEO XIII, Encyclical *Rerum novarum,* May 15, 1891, *Leonis XIII P.M. Acta,* XI, Rome 1892, 97–144
RomPont	Roman Pontifical
RP	Rite of Penance, December 2, 1973
RP	JOHN PAUL II, Apostolic Exhortation. *Reconciliatio et Paenitentia,* December 2, 1984, *AAS* 77 (1985) 185–275
RPE	PAUL VI, Apostolic Constitution *Romano Pontifici eligendo,* October 1, 1975, *AAS* 67 (1975) 609–645
RR	Roman Rota
rubr.	rubric
S. Cong.	Sacred Congregation
S. Th.	*Summa Theologica*
SAL	Society of Apostolic Life
Salamanca Com	*Código de Derecho Canónico, bilingüe comentada,* Salamanca, 11th ed. 1992
SAP	Sacred Apostolic Penitentiary
SapChr	JOHN PAUL II, Apostolic Constitution *Sapientia christiana,* April 15, 1979, *AAS* 71 (1979) 469–499
SArt	SACRED CONGREGATION FOR THE HOLY OFFICE, Instruction *Sacrae artis,* June 30, 1952, *AAS* 44 (1952) 542–546
SC	VATICAN II, Constitution on the Sacred Liturgy, *Sacrosanctum Concilium,* December 4, 1963, *AAS* 56 (1964) 97–138
SCB	Sacred Congregation for bishops

SCBR	Sacred Congregation for bishops and Regulars
SCC	Sacred Congregation for Clergy
SCCE	Sacred Congregation for Catholic Education
SCCong	Sacred Consistorial Congregation
SCCouncil	Sacred Congregation of the Council
SCCS	Sacred Congregation for the Causes of Saints
SCDF	Sacred Congregation for the Doctrine of the Faith
SCDS	Sacred Congregation for the Discipline of the Sacraments
SCDW	Sacred Congregation for Divine Worship
SCEC	Sacred Congregation for the Eastern Churches
SCEEA	Sacred Congregation for Extraordinary Ecclesiastical Affairs
SCEP	Sacred Congregation for the Evangelization of Peoples or for the Propagation of the Faith
SCHO	Sacred Congregation for the Holy Office
SCong	SACRED CONGREGATION FOR RELIGIOUS, Normae *Sacra Congregatio*, July 7, 1956
SCPF	Sacred Congregation for the Propagation of the Faith
SCR	Sacred Congregation for Religious
SCRit	Sacred Congregation for Rites
SCRSI	Sacred Congregation for Religious and Secular Institutes
SCSDW	Sacred Congregation for Sacraments and Divine Worship
SCSUS	Sacred Congregation for Seminaries and University Studies
SDL	JOHN PAUL II, Apostolic Constitution *Sacrae disciplinae leges*, January 25, 1983, *AAS* 75 (1983) pars II, VII–XIV
SDO	PAUL VI, motu proprio *Sacrum diaconatus ordinem*, June 18, 1967, *AAS* 59 (1967) 697–704
Secr. St.	Secretariat of State
sect.	section
sess.	session
SFS	CONGREGATION FOR CATHOLIC EDUCATION, Circular Letter *Spiritual Formation in Seminaries*, January 6, 1980, *Leges ecclesiae*, 6, col. 7857–7867
Signatura	Supreme Tribunal of the Apostolic Signatura
SMC	JOHN PAUL II, Apostolic Constitution *Spirituali militum curae*, April 21, 1986, *AAS* 78 (1986) 481–486
SN	PIUS XII, motu proprio *Sollicitudinem nostram*, January 6, 1950, *AAS* 42 (1950) 5–120
SNAS	*Special Norms to be Observed in the Supreme Tribunal of the Apostolic Signatura ad experimentum*, March 23, 1968
SNB	Secretariat for Non-Believers
SOE	PAUL VI, motu proprio *Sollicitudo omnium Ecclesiarum*, June 24, 1969, *AAS* 61 (1969) 473–484

SPC	PIUS XII, Apostolic Constitution *Sponsa Christi*, November 21, 1950, *AAS* 43 (1951) 5–24
SPCU	Secretariat for Promoting Christian Unity
SRR	Sacred Roman Rota
SRR Dec	*Sacrae Romanae Rotae Decisiones seu sententiae*, 1–40 (1908–1948) TRIBUNAL APOSTOLICUM SACRAE ROMANE ROTAE, *Decisiones seu sententiae selectae*, 41–66 (1949–1974) TRIBUNAL APOSTOLICUM ROTAE ROMANAE, *Decisiones seu sententiae selectae*, 67–72 (1975–1980) APOSTOLICUM ROTAE ROMANAE TRIBUNAL, *Decisiones seu sententiae selectae*, 73 (1981)
SRS	JOHN PAUL II, Encyclcial *Sollicitudo rei socialis*, December 30, 1987, *AAS* 80 (1988) 513–586
SS	PIUS XII, Apostolic Constitution *Sedes sapientiae*, May 31, 1956, *AAS* 48 (1956) 334–345
StC	Studia canonica
Syn. Bish.	Synod of bishops
tit.	title
TRR	Tribunal of the Roman Rota
UDG	JOHN PAUL II, Apostolic Constitution *Universi dominici gregis*, February 22, 1996, *AAS* 88 (1996)
UR	VATICAN II, Decree on Ecumenism, *Unitatis redintegratio*, November 21, 1964, *AAS* 57 (1965) 90–112
UT	SYNOD OF BISHOPS, *Ultimis temporibus*, November 30, 1971, *AAS* 63 (1971) 898–922
VI	Liber sextus
VS	SACRED CONGREGATION FOR RELIGIOUS AND SACRED INSTITUTES, Instruction *Venite seorsum*, August 15, 1969, *AAS* 61 (1969) 674–690
VSp	JOHN PAUL II, Encyclical *Veritatis splendor*, August 6, 1993, *AAS* 85 (1993) 1133–1228
X	*Liber extra* (*Decretales Gregorii IX*)
yr.	year

PARS II
De iudicio contentioso

PART II
The Contentious Trial

INTRODUCTION

Carmelo de Diego-Lora

1. To avoid repetition with respect to the use of the terms *trial* and *process*, see the introductions to book VII and to part I, *De iudiciis in genere*. Both of these terms denote the idea of contention within the sphere of procedural law.

2. The justification for this heading is to group together under the same title the methods of ordinary proceeding in the *CIC*: the ordinary contentious trial (discussed in section I) and the oral contentious process (discussed in section II). To Acebal, the distinction in book VII between parts I and II separates the static part of the process from the dynamic part of the process, a division that "is not altogether justified."[1] In fact, the introduction of the oral process into the *CIC* was a source of conflict within the Code Commission.[2]

The distinction would have been well founded if the oral process had been assigned some broader possibilities for functionality, comparable to those of the written ordinary contentious process. However, there are several reasons for its limited use, including the excluding norm of c. 1690, the procedural nullity provided in c. 1669, the existence of the documentary process for matrimonial nullity (cf. cc. 1686–1688), and the fact that causes of separation, although they can follow the oral process (cf. c. 1693 § 1), practically must be lodged in the civil forum pursuant to c. 1692 § 2.

3. From another point of view, section II is an appendix to the canons of section I, as emphasized by its canons that refer to others. This occurs with c. 1658 § 1, which quotes c. 1504 for the petition; c. 1659 § 2 for the

1. J.L. ACEBAL, commentary on part II: The Contentious Trial, in *Salamanca Com.*
2. Cf. *Comm.* 11 (1979), pp. 247–248.

judicial citation with reference to c. 1512; the reference to c. 1600 in c. 1665; the need to use the general criteria presented in cc. 1526–1586 when proposing, presenting, and issuing an opinion on evidence, in that section II has no norms in this regard, except what is provided in c. 1663; as well as omitting canons related to appeals, and therefore it is necessary to use the general criteria offered in cc. 1628–1640 for this ordinary recourse.

4. These remarks are not a criticism of the oral contentious process. On the contrary, its introduction into the new canonical procedural system is an improvement. However, this enrichment of the procedural process would have been more effective if more occasions had been provided for its use.

5. In its first subparagraph, c. 1670 tries to remedy the gaps in the oral process with a general reference to the canons of the ordinary contentious process. However, in its second subparagraph, it grants tribunals the authority to repeal any procedural norms not required for the validity of procedural acts, so that the speed with which the activities of the oral process must take place is unhindered by rigorous application of norms provided in principle for the ordinary contentious process. The inappropriateness of the verb used (*derogare*) should not cloud the intent that inspired the provision.

Therefore, in the organization of procedural law in the *CIC*, the oral contentious process is situated on an equal footing with the ordinary process, concerning its possible use. But, at the same time, it is presented more as a type of expedited process in cases not excluded by legislative provisions, provided that the parties agree with its use (cf. c. 1656 § 1).

6. Finally, the heading *De iudicio contentioso*, is not altogether conceived for the procedural dynamism. This is in contrast to the heading *De iudiciis in genere* of part I, which regulates the static aspects of the process, namely the organization of tribunals, the conditions for capacity that must be met by the parties to the process, and the conditions for capacity and professional competency that must be possessed by the advocates and procurators.

Apart from the difficulty in making a clear distinction between both aspects of a juridical institution of an essentially dynamic nature, it is sufficient to observe, in this section I of part II, chapter I of its title IX, dedicated to the adjudged matter, to conclude the following: part II, albeit basically dedicated to the description of the procedural order of the contentious trial cannot be explained other than as a continuance of part I, in the same way as section II of part I in book IV of the *CIC*/1917.

In the new regulations, the canons on the oral contentious process are presented as a partial regulation of briefer exceptional norms, of the plenary process, which lack the sufficient consistency and proportion to constitute its own distinct section, comparable to the canons dedicated to

the ordinary contentious trial. Lastly, by giving the title *De iudicio contentioso* to this entire part II, it seems to be setting forth a principle of exclusivity for the contentious nature for ordinary written and oral processes, which is inaccurate. This is because contentious trials are also the causes of nullity of marriage and the documentary process, causes for the separation of spouses (cf. c. 1692 § 1), causes for the nullity of ordination (cf. cc. 1709 § 1 and 1710) regulated in part III, as well as the criminal process (cf. c. 1721), covered in part IV.

SECTIO I
De iudicio contentioso ordinario

SECTION I
The Ordinary Contentious Trial

INTRODUCTION

Carmelo de Diego-Lora

I. ITS EXPANSIVE FORCE ON THE ENTIRE CANONICAL PROCEDURAL SYSTEM

This section of the *CIC* addresses the ordinary contentious trial, but it includes some other canons with a more extensive application. For example, the first of its canons, c. 1501, sets forth the absolute principle of party initiative, which is not only characteristic of the ordinary contentious trial but all of procedural law. Moreover, the last title of this section, which refers to execution of the judgment, reveals some norms that not only do not belong exclusively to the ordinary contentious trial, but, in that they are outside of the proper procedural *cognitio*, are applied also to the oral contentious process and to those classified as special, except for exceptions such as for causes of marriage nullity (cc. 1684–1685).

Therefore, a number of canons in this section have a general scope. This occurs, for example, with cc. 1509–1512 regarding the summons; with matters governed under the heading "The Judicial Instance" (cc. 1517–1525); with those included under the heading "Proofs" (cc. 1526–1583); with those derived from the parties' failure to appear (cc. 1592–1595); with the intervention of a third party (cc. 1596–1597); with several of the canons regulating judicial pronouncements (cf. cc. 1607–1608); with those established for challenging judgments and for the adjudged matter (cf. cc. 1609–1648), with the peculiarity of cc. 1643 and 1644, with a specific application; and with c. 1648 on judicial costs and free legal aid. Moreover, c. 1670, on the oral process, makes an express reference to the norms on the ordinary contentious trial, and c. 1691, on causes of marriage nullity, makes a similar reference to the *super rato* procedure. With regard to evidence, there is an express reference in c. 1702 to the canons on the ordinary contentious trial and in c. 1710, for causes of the nullity of sacred

ordination, there is an express reference to the ordinary contentious process, as well as for the criminal process (c. 1728). As Moneta[1] has noted, for special processes, the *CIC* does not offer specific provisions but merely highlights the unique feature involved, leaving the rest to the system established for the ordinary contentious trial.

In conclusion, in the section "The Ordinary Contentious Trial," the legislator offers a description of the *ordinary* process, which is the normative guideline for any judicial claims lodged without a specific reference to any special process. Its norms generally apply to all canonical processes, at times principally—as in the process for nullity of sacred ordination and in the criminal process—, and in the remaining phenomena, with a subsidiary nature. It is a process that parallels the one regulated in titles VI–XVII of book IV of *CIC*/1917 (cc. 1706–1924).

II. GENERAL STRUCTURE OF THE PRESENT PROCESS

1. *On the introduction of the case*

The first phase is described in title I of this section: "The Introduction of the Case." Four procedural steps occur in this phase: 1) the admission of the libellus of the lawsuit (cc. 1501–1506); 2) the summons of the respondent or respondents (cc. 1507–1512), which results in the start of the instance (c. 1517); 3) the appearance before the judge of the respondent and the answer to the complaint (cc. 1507 and 1513 § 2 first subparagraph); and 4) the formulation of the *dubium* or *dubia* (c. 1512 §§ 1 and 2 second subparagraph), which originates with the *contestatio litis* (cf. c. 1513 § 1), with a series of effects determined in cc. 1514–1516.

Of these steps, the third is not necessary, since the respondent has the option of not appearing, in which case, c. 1592 opts for the declaration of the absence of the party, fully respecting the dispositive principle. On the other hand, *CIC*/1917 came out in favor of the effect of contempt (cf. cc. 1842–1851), by which the party's attitude was understood not as an exercise of a right to make use of procedural rights, but as a contempt for judicial decrees and a lack of cooperation in the administration of justice.

On the initiative of a party, before the formulation of the *contestatio litis*, dilatory and mixed exceptions may be filed (cf. cc. 1459 and 1462). Since these exceptions give rise to particular incidental matters, they require resolution before the main issue is resolved. Due to their seriousness (cf. c. 1587), these exceptions not only interrupt the normal pace of

1. P. MONETA, *La giustizia nella Chiesa* (Bologna 1993), pp. 70–71.

the process (cf. cc. 1589 § 1 and 1590 § 1), but, on some occasions, they will prevent the process from continuing (cf. c. 1618).

With a lesser effect than the presentation of a question of competence (cf. c. 1460), either party can interrupt the process by lodging a recusal against any of the ministers of the competent tribunal (cf. cc. 1447–1451).

Lastly, the lodging of a counteraction by the respondent against the plaintiff (cf. c. 1494) may prevent the formulation of the issue at the proper time, or once the issue is formulated, makes it necessary to have it lodged and to proceed to another determination of the new *dubium*, because c. 1463 § 1 grants an excessively long term for the counteraction after the answer to the complaint.

2. *The period of proofs*

a) *Procedural phase not necessary*

The second phase of the ordinary contentious process will not always be necessary, because it is possible that the factual issues are already proven with documents and these proofs have been provided with the libellus of the lawsuit or when the complaint is answered. The *CIC* says nothing in this regard, since from c. 1505,2°, it can only be said that the libellus of the lawsuit only requires statements of the evidence on which the plaintiff is basing the claims; and from cc. 1507 and 1513 § 2 subparagraph one, in connection with the answer to the complaint, it cannot be inferred that, when answering, the respondent must object, providing documentary evidence on which his or her claims are based. It is not required, but nothing prevents it, and it is advisable from the perspective of judicial economy. In the oral contentious process—a code innovation that has not experienced as much in its wording the duplication of the previous legislation as is noted in the ordinary process—c. 1658 § 1 provides that the plaintiff must indicate the evidence that he or she could not provide in the complaint, by which the complaint is presented as the first vehicle for the presentation of evidence. Paragraph 2 of c. 1658 orders that the documents on which the petition is based must be added to the complaint, at least in the form of a certified copy. Additionally, this innovation is not a result of the oral nature of the process, in that this phase of the introduction of the case in the oral contentious process also uses the principle of writing. It is a consequence of the introduction of a more-evolved procedural innovation, which has not been taken into account in the drafting of the respective canons of the ordinary process. Therefore, it is advisable, from the beginning of the process, to make every effort to support the claims of either party with evidence. The fact that this presentation of documentary evidence with the complaint is advisable is confirmed to a large extent when it is noted that the judge or the presiding judge of the

tribunal can reject the petition *in limine* when acquiring the certainty that the requests formulated therein lack any basis (c. 1505 § 2,4°).

There will also be no need to proceed to the opening of the period of proofs when the object of the process is merely a *quaestio iuris*, and there is agreement by both parties regarding the alleged facts, from which there is an attempt to deduce different juridical consequences through different interpretations. If to this is added the fact that the judicial organ, if it does not find it necessary in the specific case to use the ex officio initiative authorized by c. 1452, after the *litis contestatio*, may then decide to proceed directly to the publication of the cause (c. 1598), if documentary evidence withheld from the party who did not provided it was included in this introductory phase of the cause, or if this latter situation does not occur, if the parties claim that no evidence will be presented, the decree of the conclusion of the case will be pronounced directly (cf. c. 1599).

Canon 1516, although it uses the word *praestituat*, which is imperative, must be understood in this way—because it will usually be advisable to open the period of proofs—provided the circumstances that are present in the specific process do not warrant otherwise.

b) *Distinction between term and period*

Another aspect that deserves to be highlighted in connection with evidence is that the judicial decree will determine, pursuant to c. 1516, a *congruum tempus* intended for the proposal and examination of evidence. It is what procedural doctrine designates by the word *period*, that is, not a designation of a specific day on which a procedural activity is to be performed before the judge or which ends the possibility of the exercise of some procedural option, for which the word *term* is usually used, which can lead a reader of the *CIC* to confusion, because the *CIC* uses the Latin word *termini*. When in cc. 1465 and 1466 this word is used, which literally translated would be terms, it is referring to what canonical doctrine[2] designates as *dilatio*, a space of time consisting of a continuous series of days, in which certain procedural acts can take place.

No distinction is made between the period for the proposition and the period for examination of the evidence, although certain proofs—those in which third persons outside of the process, who must appear to offer their testimony before the judicial organ or issue before this organ an expert opinion, are needed for its examination—require it. The *CIC* sets forth the need for two very different moments to be indicated for said evidence, one for its proposition and another for its examination (cf. cc. 1552, 1554 and 1569 for witnesses, and 1575 and 1577–1578 for experts). However, at any point in the sole period indicated as a period of proofs, that proposition can be made, which the judge may or may not accept, if it is evidence the examination of which requires only using a time period that allows its

2. Cf. F. ROBERTI, *De processibus*, I (Rome 1956), p. 448.

inclusion in the total established period, unless the judge believes that said period must be extended (cf. c. 1465 § 2).

That period of proofs shall be established by the judge at his discretion. For this purpose, he will take into account the relevance for each process of any evidence one wishes to provide or one wishes to propose, as well as any difficulties in its examination. This period, common for the proposition and examination of evidence, although its setting is at the discretion of the judicial organ, must be determined by the judicial organ, taking care not to exceed the total time of the processes provided by c. 1453; which in the first instance does not last longer than one year, and six months in the subsequent instance. The judicial discretion must then be, in these cases, subject to prudence that avoids excessive duration of the processes beyond what the legislator has indicated.

However, this period, in that it is judicial and not legal or fixed (cf. c. 1465), may be extended by the same organ that set it, provided that there is just cause and the parties have first been heard if either of them did not request said extension. In practice, it is usually required that said extension, if it is requested on the initiative of a party, be requested before the expiration of the term already established, because a term that has already lapsed cannot be extended, and also in order to avoid possible manipulation by the party when it wishes to obtain unfounded delays. In any event, when the extension is granted, the judge must take care, as provided in c. 1465 § 3, that the process not take too long as a result of the extension. For this purpose, the time set in c. 1453, indicating at least a fair and praiseworthy legislative intent, will be useful as an ultimate criterion when granting the extension.

Lastly, the calculation of the judicial periods indicated for evidence must be understood as continuous time (cf. c. 201). However, if the term *ad quem* of this period (cf. c. 203 § 2) is pending the performance of some evidentiary activity, and that day the tribunal is closed, said day must be understood to be shifted—*prorrogatus*, improperly stated in c. 1467—to the first canonical day. In short, it is not appropriate to examine any evidence, if they are not the documents included in the instruction of the cause, outside of the period of proofs, and only for a grave reason may they be examined early in a case (cf. c. 1529); the collection of evidence in the period indicated for evidence is also allowed as an exception after the conclusion of the cause, in the phenomenon of c. 1600.

c) *Scope and evaluation of the proof*

The system of proof for the ordinary contentious process is described and regulated throughout title IV, *De probationibus*, of this section I, *De iudicio contencioso ordinario*. But this description and regulation not only applies to this type of trials, but in fact that title contains the canonical system of proof for every process, whether it is an ordinary, as is also the oral contentious trial, or a special process, which

category must also include the criminal process, even if it is regulated separately. As we stated before (*vide supra*, no. I), this ordinary contentious process, as a model process for all canonical processes and even for special processes, enjoys in its norms a subsidiary value, and this also should be stated with respect to the regulation of proof in the ordinary contentious process. In fact, cc. 1663–1666 discuss evidence in the oral process, but nothing is regulated with respect to the means of proof, the specific method for proposing and examining it in the act of the hearing, or the criteria for its assessment by the judge. Likewise, although in cc. 1678–1680 there are some peculiarities with respect to proof for the nullity of marriage, these provisions include necessary compliance with the norms of the ordinary process regarding proof, which cover the entire gap left by the aforementioned canons, as also seen in the express references to cc. 1559, 1536 and 1574, belonging to the ordinary process. Moreover, in c. 1702, regarding the *super rato* procedure, express reference is made to the means of collecting evidence in the ordinary contentious process.

The system of proof in the canonical process is freedom in choosing the means of proof, if they are useful and do not violate legal provisions (cf. c. 1527 § 1). However, following the *CIC*/1917, a complete regulation of the means of proof is set forth—statements from the parties and testimony from the parties, public and private documents, testimony, expert opinions, judicial access and acknowledgment, and presumptions—in cc. 1530–1586, including on various occasions specific norms for their assessment by the judicial organ, as occurs with cc. 1536–1537 for the judicial confession, cc. 1541–1543 for documents, cc. 1572 and 1573 for witnesses, c. 1579 for expert testimony, and c. 1585 for presumptions. Of these latter, it can only be added that their assessment is already especially provided with the words *non indigent probatione* of c. 1526 § 2 regarding the burden of proof. In spite of the assessments made of the various proofs in these canons, which could lead one to believe that the *CIC* follows a legal system of assessment of proofs, nevertheless, as can be inferred from c. 1608 § 3, it first refers to the judge's conscience for said assessment, although he must respect the norms established for this purpose. After considering this provision, it can be concluded that the current canonical system is still freedom in assessment of proofs, tempered by the criteria established by the *CIC* on this assessment.

A while ago, with respect to c. 1869 § 3 *CIC*/1917, the precedent to the current c. 1608 § 3, we posed the question of how to interpret it, when shaping moral certainty, making that reference to the judge's conscience to evaluate the proof compatible with that subjection to the norms of legal assessment of evidence. Those "criteria of legality would serve as guidance and working material for the trier, but nevertheless demanding that, should he not abide by them in his judgment, he set forth the reasons that led him to not take them into account." This legal need to freely express the assessment of a given proof in laying the basis for the judgment is seen to be demanded by c.1579 § 2—as already required in c. 1804 § 2 *CIC/*

1917—for assessing expert opinions, whether it is accepted or rejected by the judgment. In the case of legal assessment of the evidence, a manifest explanation by the judicial organ would be sufficient when, according to conscience, it does not follow said legal criteria, such that it must follow "first the criteria of legal assessment, even if they are not binding, even if the reasons why one feels free to not follow them must be expressed."[3]

Today, this interpretation has the support of the new code, the spirit of which tends to authorize the judge—as indicated by Garcia Failde"to be able to assess the majority of the evidence according to his discretion and to be able to apply the law with flexibility and according to the specific situation."[4] For these reasons, we do not share the theory maintained by the former classification of full proof for certain means of proof, which are the judicial confession pursuant to c. 1536 § 1, ecclesiastical or civil public documents pursuant to c. 1541, and the legal presumption of law, as provided in c. 1585. This in fact occurs, provided that it is not proven otherwise, and in this sense we nonetheless generally share, albeit to a larger extent, the opinion maintained by Stankiewicz[5] in the dialectics of proof, when he reduced this effect to other means of proof, different from those last cited, which only will be full proof if other evidentiary elements that fully strengthen them are also present. The difference between these means of proof lies, in our opinion, in the fact that the only thing enjoyed by the former is a favorable presumption of the truth that is lacking for the others. Therefore, the phrase *non indigent probatione* of c. 1526 § 2 is too emphatic in principle. On the other hand, we agree with Corso[6] when he proves that the new *CIC*, compared to the old one, is more in accord with the system of free assessment of evidence, although he then indicates that this particularly occurs in matrimonial processes.

3. *Publication, conclusion of the case, and final replies*

Once the evidence is collected, and the evidence collected through judicial assistance (cf. c. 1418) is received, the judge shall pronounce a decree ordering the publication of the acts of the process. This decree opens a new stage of the ordinary contentious process, the regulation of which is included in title VI of part I, under the heading *De actorum publicatione, de conclusione in causa et de causae discussione.* This describes the various procedural steps that occur in an ordered successive progression,

3. C. DE DIEGO-LORA, *Estudios de Derecho Procesal Canónico*, II (Pamplona 1973), pp. 17–18.
4. J.J. GARCÍA FAÍLDE, "Libro VII. Los procesos," in *Ecclesia*, March 26, 1983, n. 2119, p. 29.
5. Cf. A. STANKIEWICZ, "Le caratteristiche del sistema probatorio canónico," in *Il processo matrimoniale canonico*, 2nd ed. (Vatican City 1994), pp. 588–592.
6. Cf. J. CORSO, "Le prove," in *Il processo matrimoniale...*, cit., p. 623.

once the period of proof concludes, in the progress towards that last moment of the process, which is the judgment.

a) *Numerous judicial decrees*

When no incidental complications arise, carrying out these judicial activities entails: *first*, decree of publication and period for the examination of the acts (cf. c. 1598 § 1); *second*, new decree ordering the conclusion of the cause (cf. c. 1599 § 3); *third*, need for a third decree by which the parties are offered a common period for, according to c. 1601, presenting written *defensiones vel animadversiones*, which can on the other hand become a mere act of oral hearing before the duly constituted tribunal (cf. c. 1602 § 1) if the judge and the parties agree thereto, by which the process, once the session concludes, will be pending the judgment, similar to the situations established in c. 1606; *fourth*, if the written system for final pleadings was followed, a fourth decree will have to be pronounced to order an exchange between the parties of their respective pleadings, for which a new period must be established—*intra breve tempus*, pursuant to c. 1603 § 1—for the presentation of the replies, which if it is a right that is exercised only once, the judge for grave cause may nonetheless grant again, to the litigants, including the promoter of justice and the defender of the bond if they participate in the process (c. 1603 §§ 2 and 3), which will require a fifth decree and indication of a new subsequent period; *fifth*, the judge may even pronounce a sixth decree, after the exchange of the parties' briefs, ordering a moderate oral discussion before the tribunal in order to clarify any outstanding issues (cf. c. 1604 § 2), for which he will set a new date and time for it to be held. Until this oral discussion is concluded, the case will not be pending judgment, without prejudice to the possibility of having to decree suspension of the hearing for justified reasons of the parties' or advocates' inability to appear, which would lead to a new decree for setting a new date and time for the pending oral discussion.

There are numerous difficulties that every judge will face in the ordinary contentious process in complying with maximum time limits—one year in the first instance and six months in the second—indicated by c. 1453 for the length of the processes. Therefore, the judge or tribunal must take great care when ordering the time in their decrees indicating the periods, as can be seen from a mere reading of the procedural norms.

b) *New probatory incidents*

However, there can even be more possibilities for using up other time periods; incidental proceedings related to late propositions of evidence arise which when added to the previous ones will create new delays required by complications in their hearing.

It is sufficient to observe, in the first place, that c. 1598 § 2 allows other evidence to be presented to the judge in the middle of the period for the publication of evidence, breaking all limits imposed by the necessary

procedural preclusion, which would force the judge to pronounce a new decree for the publication of this evidence. And what is more, c. 1600 § 1 authorizes the judge to order other evidence not previously requested, and even if it determines the reason for its proposal and limits the requirements for its admission, this evidence undoubtedly affects the pace of the proceedings, causing necessary interruptions that may extend for an indefinite time the length of the process, especially when § 3 of c. 1600 demands that in these cases, there must be a new publication of the acts. From another point of view, it is also worth noting with regard to these offers of evidence outside of the period of proofs, and these subsequent publications for the examination of the acts, whether they are finished once they are examined or if, on the other hand, subsequent initiatives from its publication are allowed in the same sense, inasmuch as the *CIC* says nothing in this regard.

c) *Criticism of this phase of the process*

In any event, this latter stage of the proceedings, before the judgment is extensive and involves considerable prejudice to the principle of judicial economy, must guide every concept of the procedural system of guarantees. It is noteworthy that in discussions of the commission writing the code, it appears these issues were not raised. Moreover, in canonical procedural doctrine, critical objections against cc. 1598–1605 were not noticed, or at least concerns about their dilatory effects, subject to the abuses of procedural maneuvers. On the other hand, a good system of publication of the acts is perfectly compatible with some late proofs, correcting previous deficiencies in this regard, and, with the powers granted to the judicial organ by c. 1452, we believe this to be an easy and quick solution. Then we wonder if the procedural system acquired as a legacy from the former Canonical-Roman process of intermediate law has been able to carry weight in the thought of canonists, to the extent that they did not take advantage of the opportunity presented with the new *CIC* to be able to influence with their technical advice the reform of the former schemata of the ordinary contentious process. On the other hand, if we dare formulate this thinking expressed here, it is because we believe that with sufficient publication of the acts, limited to the parties and their advocates, and a power of judicial initiative with respect to the supplementary presentation of evidence, these written pleadings are not necessary after the period of proofs. In the extreme case, a moderate oral discussion for clarification, similar to that provided in cc. 1604 § 2 and 1605, would be sufficient.

The judge must achieve moral certainty regarding what is claimed and proven, according to c. 1608 § 3. Everything that the parties had to claim in the process has already been done in the period called the introduction of the cause and then in any incidental matters that arose until the conclusion of the cause. Formulating subsequent allegations only serves the purpose of critical analysis by the parties regarding the evidence presented to the process, and each of the subjects, wishing to obtain a

favorable judgment, usually submits to the judge, in those pleadings, a critical exposition that is usually slanted by the interests of those making these claims. Instead of making things easier, subsequent allegations, with their self-seeking interpretations, usually confuse what has been proven and previously claimed. Every reform to the ordinary contentious process requires a reconciliation of the most absolute principle of guarantees with that of judicial economy. Therefore, it is worth dispensing with some activities by the parties that can add nothing new to the process except subjective opinion. The conclusion of the cause is when the judge, in the solitude of his ministry, no longer using the self-seeking interpretations of the evidence, must calmly study, independent of any partisan influence, the record of the case, and then he can achieve moral certainty using only these objective bases of knowledge that are the parties' claims and the evidence they presented, in addition to any that came on the initiative of the organ of justice.

4. *The definitive sentence*

The last stage of development in the process is that intended for the pronouncement of the judgment. Its regulation is found in cc. 1607–1618. These cover the entire title VII, *De iudicis pronuntiationibus*. A look at the heading already shows us that the canons it contains not only discuss the definitive judgment, which resolves the *litis*, but also regulate other resolutions of lesser importance, which are interlocutory judgments (cf. cc. 1607, 1613 and 1618), and decrees, whether or not they are merely procedural (cf. c. 1617); also interlocutory judgments and decrees that have definitive efficacy (cf. c. 1618).

With respect to the so-called definitive judgment, the *CIC* has a precise concept thereof (cf. c. 1607) and in its canons distinguishes between a judgment pronounced by just one judge and by a collegiate tribunal, indicating a common period for issuing it, although for a collegiate tribunal a longer delay may be allowed in a specific case for a grave reason (cf. c. 1610 § 3): within that common period for pronouncing the judgment, the sole judge must receive the advice of the assessors, if they were appointed, which is authorized by c. 1424. The judgment must be the exclusive task of this sole judge (cf. c. 1610 § 1). On the other hand, when it is a collegiate tribunal, the formulation of the judgment is the result of the work of the college of judges which by nature requires a certain internal procedure for its decision and drafting (cf. cc. 1609 and 1610 § 2); cc. 1426 § 1 and 1429, which could have been included in title VII, are also decisive factors.

The *CIC* distinguishes between the internal (cf. c. 1611) and external (cf. c. 1612) requirements of the judgment, and also regulates the procedures for its publication (cf. c. 1614 and 1615) and for correcting any mistakes or for finishing it in some way (c. 1616). However, there is a canon

that is of particular importance, c. 1608. More than the internal requirements for the judicial act, it points to the intellectual opinion itself that the judge must shape in his own practical understanding, regarding the object that must be resolved: it is the so-called moral certainty of the judge. First, Pius XII made a pronouncement about it, and then various subsequent discourses of Roman Pontiffs have been based on his doctrine, when they have annually addressed the Roman Rota.

III. CHARACTERISTICS OF THE ORDINARY CONTENTIOUS PROCESS

The ordinary contentious process, divided into these periods or phases that occur during its development, as has been indicated before, is presented with the following features that outline it:

1. *Principle of writing*

With the form of a process in which the most rigorous *principle of writing* governs, what is provided in c. 1472 fully occurs therein: all the judicial acts must be drafted in writing. This is supported by cc. 1504, 1508, and 1513 for the period of introduction of the cause, cc. 1567–1569, 1578 and 1583 for evidence, as well as cc. 1598 and 1601–1604 for the period of publication and final discussion of the cause, and cc. 1609 §§ 2 and 4, 1612 and 1615 for the judgment and its publication; lastly, the presence of the notary in the acts (cf. c. 1473) and the risk of nullity if they are not signed by him (cf. c. 1437 § 1) support the formal requirement of the written form in the process.

2. *Division mitigated into preclusive periods*

Another characteristic consists of being a process *subject to preclusive periods*, at the end of which the various terms indicated for the different periods are extinguished, although *this preclusiveness is tempered* by provisions such as those contained in c. 1514 which allows, for a grave reason and after a hearing for the parties, a late modification of the dispute as it was established in the *litis-contestatio*. Moreover, in that the period of proofs is set by the judge (cf. c. 1516), it can be extended for just cause (cf. c. 1465 § 2) and although the possibility of an extension does not threaten the preclusiveness principle, it can nonetheless actually be altered when the judge grants those extensions, as occurs with the period for the collegiate tribunal to pronounce judgment, which legal period can be extended if there is a grave reason (cf. c. 1610 § 3). Moreover, where

this preclusiveness is threatened to a greater extent is, on the one hand, through the possible postponements, which can be granted for the final arguments, in that these periods are judicial (cf. cc. 1600–1603), but on the other and especially, through the legally-established possibility of proposing new evidence when the cause is published (cf. c. 1598) and even after the decree of conclusion of the cause (cf. c. 1600).

We noted that the preclusiveness is also threatened by the permission of cc. 1459 and 1462 § 1 respectively for filing dilatory and mixed exceptions, as well as by the long term granted after the answer to the complaint for the counteraction to be filed (cf. c. 1463 § 1). To this may be added the fact that c. 1593 § 1 authorizes the party who was declared absent from the trial to appear thereat before the case is resolved, in which case this party is allowed to adduce conclusions and evidence, with the sole limitation of complying with c. 1600. Moreover, a third party intervening in a process is authorized to appear and defend his or her interests at any time in the process before the conclusion of the cause and at any instance (cf. c. 1596). The judge must grant a "brief and peremptory" period for presenting evidence if the cause has reached the period of proofs, but without there being any prescription on that option when the third party intervenes in the process after said period is finalized and before the conclusion of the cause.

3. *Principles of initiative of the party and the officials; the principle of rogation*

Also governing the ordinary contentious process is the procedural *principle of initiative of the party* which c. 1501 clearly expresses, and, for an amendment of the dispute, c. 1514 also requires that initiative. For the evidence, this principle results from the proclamation of the *onus probandi* on whoever states the facts (cf. c. 1526) and in the same sense, for witness testimony, cc. 1551, 1552, and 1555; and even for witnesses, on which if, on the one hand, c. 1575 clearly provides that it is the judge who designates them, on the other, the presence in the process of the new position of private experts designated by the parties is also allowed (cf. c. 1581).

In turn, this principle of initiative of the party is tempered by a canon of part I, c. 1452 § 1, in which, although it comes out in favor of the principle of initiative of the party, the initiative is reduced to causes that only concern individuals. On the other hand, once the cause is introduced, if it is a cause that affects the public good of the Church, it comes out fully in favor of the *principle of* ex officio *action.* To this is added, complementarily, for all types of causes, the norm of c. 1452 § 2, which not only, in view of the fear of pronouncing a seriously unjust judgment, authorizes the judge to present evidence, but even to files exceptions, which, except in

the case of any defect that would entail nullity of the judgment and absolute incompetence, seem to be defenses that only devolve upon the parties (cf. cc. 1459–1462; as opposed to c. 1642 § 2 which grants the judge the power to declare ex officio the adjudged matter exception). "The passivity of the parties cannot be allowed to prevent—claims Acebal—an awareness of the objective truth or allow the judge to become a mere spectator to the judicial debate, or even a puppet of the negligence or malice of the parties." Therefore, the same author maintains "that the inquisitive principle predominates more than before in the canonical process, even in causes regarding the private good, especially during the period of proofs."[7]

Together with the principle of initiative of the party, there is the *principle of rogation,* often confused with the principle of initiative of the party. In fact, c. 1501 provides the principle of initiative (cf. also c. 1452 § 1), but cc. 1502 and 1504 provide the principle of rogation: what it is that the plaintiff is seeking. The object of the process must be shaped through the decree of the formulation of the issue, after the judge hears the respondent's answer (cf. c. 1513 § 2). The cycle of the rogation ends with the judgment, which must be consistent with the object sought, because the judge or tribunal must answer each of the issues formulated (c. 1612,1°), or risk absolute nullity of the judgment if the inconsistency is total (c. 1620,8°).

4. *The preparatory principle and its relation with the procedural impulse*

The *dispositive principle* appears fully acknowledged in cc. 1524 and 1525 for the plaintiff's waiver and abandonment as well as for the partial waiver of procedural acts, although both require, apart from other requirements, the admission by the judge. In fact, in the ordinary process, even if there is no express prohibition of the so-called procedural juridical negotiation, there is the basic idea that every procedural act of a party, to have the intended effect, needs the respective judicial sanction, which will be given through various types of merely procedural and other decrees, or through an interlocutory judgment, at times as juridical acknowledgments, at others as acts of admission or rejection, or transfers or communication and other acts of publication. Moreover, cc. 1713–1716, except in matters pertaining to the public good, highlight the validity of the dispositive principle in the ordinary contentious process when, because the litigants have arrived at a settlement, arbitration settlement, or any other type of reconciliation, and the same goes, but even more so, when they have obtained the respective arbitration proceeding, they advice the judge

7. J.L. ACEBAL, "Principios inspiradores del derecho procesal canónico," in *Cuestiones básicas de Derecho procesal canónico* (Salamanca 1993), pp. 39 and 40 *respective.*

thereof, transferring him to the process to definitively obtain its extinguishing effect (cf. c. 1525).

Nevertheless, indicated della Rocca,[8] for the *CIC*/1917, and the same can be said about the current code, if the dispositive principle is evident in many code provisions, with respect to the direction of the process, it can be said that the initiative or will of the parties is non-existent (causes of public interest), or almost null, due to some provisions of the *CIC* (which today can correspond to cc. 1453, 1589, and 1593) and to the influence of the discretion granted by the legislator to the judge (e.g., cc. 1530, 1575, and so many others such as the numerous canons setting periods, often judicial, those of mere orders and those intended for the instruction).

Lastly, this dispositive principle is also manifested in a series of diverse canons, such as c. 1411 § 1, which allows the agreement to extend limited competence to controversial issues of a contractual origin; c. 1592, when it does not require under any threat the appearance of the respondent who was appropriately summoned; c. 1460 § 1, which allows *a sensu contrario* the submission of the defendant to the competence selected by the plaintiff in relative competencies; c. 1526 § 1, when considering the presentation of evidence, not duty, but *onus*, that therefore lacks binding efficacy for the party, who only will face where appropriate the prejudicial consequences of that lack of his or her presentation supporting one's statements; c. 1551, which allows the waiver of witnesses by the party who presented them if the other party does not object, or c. 1546 when stating that none of the parties is obligated to present documents in certain circumstances; lastly, not wanting to exhaust the examples, c. 1606, which authorizes, in order that the case proceedings be pending judgment, that the parties submit to the knowledge and conscience of the judge; or c. 1636 for the waiver of the appeal, as well as c. 1633, which authorizes the implicit waiver when the appellant within the indicated term does not pursue before the judge *ad quem* the new instance initiated before the judge *a quo* on his or her own initiative.

Additionally, c. 1520 can provide the possibility of using the process in a certain way, which brings us to the *principle of procedural impulse*, which Arroba[9] says belongs to the judge, once the process has been initiated by the party, in processes affecting the public good, through the duty imposed on him to proceed ex officio in these cases. For that writer, in short, it will be the nature of the interest, be it public or private, that will induce the procedural impulse. That is because, if they are processes in which private rights of the parties are in question, the impulse is attributed to the litigants, and, on the other hand, if they are public interests, this impulse must be imputed to the judge.

8. Cf. F. DELLA ROCCA, *Instituciones de Derecho procesal canónico* (Buenos Aires 1950), pp. 58–59.

9. Cf. M.J. ARROBA, *Diritto processuale canonico* (Rome 1993), pp. 253–255.

Moreover, the problem arises when we wonder whether a judicial activity started on the initiative of a private party, even if it concerns an object of litigation that is also of a private nature, does not generate, by transcending the scope of the judicial process, a group of activities and issues affecting the public good. That is why it would have been advisable for the legislator to make an express pronouncement on the procedural impulse, which is only an *onus* for the litigants, according to c. 1520, without reference to the interests on which the litigation rests, regardless of the scope resulting from the wording of c. 1452 § 1.

5. *Limited publication of the judicial acts and the procedural acts*

The principle of publicity, albeit *limited*, is seen in the ordinary contentious process in the group of principles that inspired it: the limitations proceed from the secrecy surrounding the acts of the process, which is maintained until the time of their publication once the period of proofs expires, even if in causes affecting the public good, in order to avoid very serious dangers, the judge can also decree that some act must remain secret from the parties and their advocates (cf. c. 1598 § 1). Additionally, together with the *time limitation* for necessary publicity of the proceedings during the period of proofs, there are also concrete positive manifestations in favor of secrecy when witness testimony is received (cf. c. 1559).

There is another *limitation as a function of the recipients* of this publicity of the acts, reduced to the parties and their advocates, among those that must be included, by analogy, the promoter of justice and the defender of the bond (cf. c. 1603 § 3), because no third party may have access to said acts or to the oral discussion in the event it takes place (cf. cc. 1604 § 2 and 1605), except when it is an intervening third party, and said intervention is admitted by judicial decree (cf. cc. 1596 and 1597), or they are court-appointed experts, in which case they must become familiar with the acts of the cause and the documents and accessories—according to c. 1577 § 2—to the extent that they may need them to well and faithfully perform their office.

6. *Mediation and contact in the process*

Since the ordinary contentious process is a written proceeding, it must be concluded that normally the *principle of mediation* would govern with the resulting lack of communication between the judge and the parties. However, this is apparently not deduced from the canons of this section I of this part II, in which we can always contemplate the judge directly leading the examination of the evidence, either with the parties themselves (cf. cc. 1530, 1532, 1533 and 1535), or with the witnesses (cf. cc. 1554, 1559, 1562, 1563, 1569, and 1570), as well as with the experts (cf. cc. 1577 and 1578) and this is even provided by c. 1582 for evidence from

judicial access and inspection. On the other hand, in the title on evidence, there is only one canon on witness testimony, c. 1561, which places on an equal level, for the examination of witnesses, the judge, his delegate or an auditor. This would lead one to believe that when the CIC, concerning the hearing of evidence, mentions the judge, it also is implicitly referring to the delegate or the auditor. This results from the fact that in every process it is possible for the judicial power to delegate when they are acts before a decree or judgment (cf. c. 135 § 3 *in fine*).

It is also possible for tribunals to use the judicial assistance of other tribunals and judges (cf. c. 1418). In this situation, in the specific proof examined, there will inevitably be a lack of communication between the competent judicial organ and the subject who is subjected to the act of proof. Moreover, it is possible that in the phenomena of c. 1558 § 3 the judge may find it necessary to delegate certain acts of witness examination due to distance, illness, or another impediment, as well as in the phenomenon of c. 1528, common for judicial declarations of parties and for witnesses, which imposes a specific delegation on a lay person designated by the judge.

In fact, it must be said that the ordinary contentious process is influenced by the general authorization established by c. 1428 for the appointment of an auditor and for the receipt of evidence, which can be used by a sole judge as well as by a collegiate tribunal, which will appoint him through its presiding judge. This leads to the conclusion that, despite the appearance of immediacy visible in a literal interpretation of many canons regarding evidence, it can be said that the code system of evidence as a whole allows a lack of communication. Therefore, in the ordinary contentious process, although in general it can be maintained that *procedural contact governs, it will be present except in express delegation phenomena* for evidentiary acts or *appointment of auditors* for said purpose, which depends exclusively on judicial discretion exercised within the conditions provided by c. 1428.

7. *Principle of acquisition of proof*

Lastly, it should be added that any evidence examined in the process is incorporated into it, and not necessarily in favor of the party presenting it, but, regardless of whether it is examined by a judge, his delegate, or an auditor, whether it is proposed on the initiative of the party facing the burden of his or her statements, or, on the other hand, by the opposing party, or is subject to the principle of ex officio and inquisitive action, the judge or tribunal shall achieve formal certainty to pronounce judgment according to what is claimed and proven in the process (cf. c. 1608 § 2). Therefore, in every case in the ordinary contentious process, with or without contact, the most absolute *principle of acquisition of proof* governs: what is incorporated into the acts of the process, and no element outside thereof (cf.

c. 1604 § 1), belongs completely to the process itself and favors or prejudices either of the parties regardless of its origin, provided that it is lawful (cf. c. 1527 § 1).

IV. ON THE CONTENTION AND THE CONSOLIDATION OF THE SENTENCE

In this section 1, after the canons regulating the judgment and other judicial pronouncements, title VIII, *De impugnatione sententiae*, devotes both chapters to recourses against the judgment, under the respective headings *De querela nullitatis contra sententia* and *De appellatione*; then title IX in turn includes two more chapters, the first discussing the adjudged matter, *De re iudicata*, and the second under the heading *De restitutione in integrum*. That is, with the new *CIC* following the organization of cc. 1878–1907 *CIC*/1917, it places the efficacy of the judgment, the classic *res iudicata*, between two different types of recourses, those which common doctrine has been classifying as ordinary recourses and the so-called extraordinary recourse of *restitutio in integrum*. The variations are found in the use of the terms "remedies" and the elimination of the recourse of third party opposition, in the change of order of the regulation of these so-called ordinary recourses, and in the fact that the *CIC*/1917 placed in a canon before the recourses how to correct material errors in the judgment, that, by contrast, is now found in c. 1616, within the title dedicated to judicial pronouncements.

The *res iudicata* then appears intimately linked to *restitutio in integrum* and is so linked, as well as emphasized in the first words of c. 1645 § 1, when this recourse is conceived as a challenge of the judgment that has become an adjudged matter; and thus also its more generalized classification as an extraordinary recourse. Moreover, the plaint of nullity of judgment nonetheless goes against the same adjudged matter even if it does so indirectly, through the declaration of nullity of the judgment, when lodged after the period for appeal, as shall be explained below.

1. *Appeals and res iudicata*

The only recourse that does not go against the adjudged matter, but impedes it or, on the other hand, constitutes it, is the appeal: its lodging has a suspensive effect on the judgment (c. 1638) and consequently the adjudged matter effect itself. On the other hand, if the appealed judgment is upheld, the adjudged matter occurs under the conditions required by c. 1641,1°: only when there is no appeal, or once an appeal is lodged, it is not then formalized before the judge or tribunal *ad quem* (cf. c. 1633 and

1635), or it is waived, or the procedure in the last instance lapses due to a lack of activity (cf. c. 1520), or the definitive judgment is by nature not appealable, that is when, in the judgment pronounced in the first instance, the adjudged matter effect is present (cf. c. 1641,2°–4°).

a) *Force of the sentence and effect of the formal re iudicata*

Therefore, every definitive judgment, pronounced in an ordinary process, is called to produce the adjudged matter effect, albeit depending on the appeal when the nature of the judgment allows this type of challenge. If the appeal before the judge *ad quem* is not lodged in the established legal term (c. 1630 § 1), or it is not pursued within the established period (c. 1633), the judgment acquires *finality* ("firmitate iuris gaudet," according to c. 1642 § 1) and it can no longer be directly challenged. Moreover, if once it is challenged in an appeal, the appeal lapses at its instance or the formalized appeal is waived in this instance, we also have a *final judgment.* In like manner, the judgment acquires finality if once the appeal is pursued, at the second instance a definitive judgment upholding the previous one is pronounced. Dual conformity can hypothetically be present in another subsequent instance if the second judgment did not fully uphold the previous one: for the same reasons, on the same petition, between the same parties. Finality of the judgment, called in procedural doctrine the *formal adjudged matter,* is the effect contemplated in c. 1641. Consequently, in the future, by virtue of a legal provision, inspired in the principle *non bis in idem,* there can be no direct recourse against the judgment, such as an appeal, and the judgment can then be executed, when the *actio iudicati* acquires finality.

Without wishing to go into the problems with these canons—saving their consideration for the respective commentaries—we would now like to indicate title XI of this part, *De executione sententiae,* which closes the cycle of the judgment through its efficacy, and that requires, according to c. 1651, not only the finality of the judgment, to become executory, but an express mandate from the judge for its execution, normally called the *executory decree,* which can be added to the written body of the same judgment. This is without prejudice to the fact that on some occasions, when it concerns provisions or assistance for the support of persons, or for another just cause, provisional execution can be ordered before the finality of the appealed judgment (cf. c. 1650 § 2). However, this phenomenon is exceptional, because execution of a judgment is the normal effect of the adjudged matter (c. 1650 § 1). Therefore, this type of early execution must always be provisional, pursuant to c. 1650 § 3.

b) *Effect of the material res iudicata and the eventuality, by extraordinary means, of the contention of the sentence*

Together with the formal adjudged matter effect on a judgment that has acquired finality, there is also the *material adjudged matter* effect, which is perfectly defined in c. 1642 § 2 when it provides that the adjudged

matter "facit ius inter partes" and what figures therein is the source of actions. At the same time, it is also true of peremptory exceptions, should some procedural event arise that recommends the defense for the subject favored by them, making use of that specified *ius*. Moreover, it makes the *rei iudicatae* exception, mixed, procedural, and peremptory at the same time, arise in favor of said parties, which prevents the indirect as well as direct challenge of the content of the judgment pronouncements, of that *ius inter partes*, which makes up, with the other actions and exceptions indicated, the so-called effect of *material adjudged matter* on the final and definitive judgment; an exception that not only is mentioned in c. 1462 § 1 and its mixed nature is recognized therein, but is expressly set forth, which positively and strongly protects the principle *non bis in idem* with such strength that the judge, if he notices it, must declare its effect ex officio (c. 1642 § 2).

The material adjudged matter effect on the judgment can nonetheless be challenged through a specific recourse, that of *restitutio in integrum*, which was classified as extraordinary by c. 1905 § 1 *CIC*/1917. This classification has been eliminated by c. 1645, perhaps because it was deemed unnecessary, inasmuch as its extraordinary nature is highlighted by the provisions of its procedural norms, filing periods, and effects that the recourse must have in the execution of the final judgment (cf. cc. 1646–1648), but especially, in that it must of necessity be well-founded, apart from the fact that the injustice of the challenged judgment must be expressed, in those limited and specific causes, described by c. 1645, which are those that provide the true uniqueness of this recourse.

Moreover, not only this recourse of *restitutio in integrum* can go against the adjudged matter. The recourse designated by the *CIC* as *querela nullitatis contra sententiam* is presented in principle, by the legislative organization and by c. 1625, as an ordinary recourse together with the appeal. However, since irremediable nullity can be the object of the plaint of nullity for a term of ten years from the date of the judgment, and it can be perpetually lodged as an exception (c. 1621), while for the plaint based on remediable nullity, it has three months from when the judgment was published (c. 1623) and even within the same period the judge himself may *retractare vel emendare* that null judgment (c. 1626 § 2), it concludes: provided that the *querela nullitatis* is not lodged within the period of the appeal, its subsequent exercise converts it to an extraordinary recourse against a final judgment, which is intended, albeit indirectly, to render without effect the formal as well as the material adjudged matter.

This recourse is also an extraordinary recourse, not only because of the effect it achieves, but because of the specific procedural activity that it originates (c. 1627), and also especially because of the limitation of the causes that can serve as its basis, according to the list enumerated in cc. 1620 and 1622, for remediable and irremediable nullity respectively.

c) *Appeal the only ordinary recourse*

In fact, the only ordinary recourse against the judgment, in the canonical procedural system, is the one regulated under the heading *De appellatione.* In this recourse, for active standing, all that is required is to be the party prejudiced by the appealed judgment (c. 1628). Other characteristics of this recourse are: the attribution of competence based on criteria of the judicial hierarchy (c. 1632 § 1 and 1634 § 1); the fact that another cause is not needed on which to base the appeal than *the prejudice* to the party from the judgment, by which, to the extent of that prejudice, a total or partial appeal is allowed and the right to an appeal is also extended to those parties that did not appeal within the period (c. 1630 § 1), provided that one of them did so, be the party a joint litigant or the opposing party (c. 1637); the presentation in the appeal of the object of litigation with more breadth, because the formulation of the issues will simply discuss whether the previous judgment should be upheld or amended in full or in part, without the need for the addition of any reason that was not already in the previous instance (c. 1631 § 1); and the fact that for its procedure, it refers, with due adaptations, to the procedure of the first instance (c. 1640).

Therefore, the judgment of the appeal considers the object of the litigation insofar as it is lodged by the appellants prejudiced by the appealed judgment, always in the context of what has already been claimed and proven in the preceding instance, apart from any new evidence presented subsequently with the limitations of c. 1600 (c. 1639 § 2). This is because the evidence of the first instance is acquired by the appeal and what was then claimed must inspire discussion in the subsequent instance, apart from the specific arguments by which the judgment must be submitted to criticism by the appellants. Therefore, the appeal is a new trial before a higher judge or tribunal regarding what has already been judged by the lower court with the same elements already claimed and proven in the opinion that was issued in the judgment, in full or part according to the challenge initiative of the appellant or appellants.

2. *Res iudicata and process regarding the state of persons*

Concerning the adjudged matter, we should note, lastly, what is provided in c. 1643: “Cases concerning the status of persons never become an adjudged matter.” The provision, in its specific pronouncement, is readily accepted by procedural doctrine, and commonly, in judicial practice, it is understood as referring to processes on the nullity of marriage, which occupy, as is well-known, to a large extent, the activity of ecclesiastical tribunals. This canon sets forth an affirmation of an old canonical tradition with a negative wording, the last precedent of which was c. 1903 *CIC/* 1917. In the new CIC, an explicit reference was also made to judgments pronounced in processes on the separation of spouses.

It could be thought that the issue just mentioned does not affect the ordinary contentious process, especially when the ordinary recourse of the appeal, for the purpose of having dual conformity, is particularly regulated in cc. 1682 and 1683, that is, within title I, "Matrimonial Processes," of part III, "Certain Special Processes." However, c. 1643 has been inserted into section I, part II of Book VII, thus within the ordinary contentious process, and it does not only affect matrimonial processes, but enjoys a more general scope, because it extends to every process related to the status of persons, expressly including the process on nullity of the sacred ordination. If this latter process is also situated in the organization of the *CIC* among the special processes, nevertheless, c. 1710 provides that when these causes are referred by the competent congregation to the tribunals, the tribunals will observe the canons on trials in general and on the ordinary contentious trial; c. 1691 also contains a similar norm for matrimonial processes. Therefore, the unequivocal statement in c. 1643 can also be subject to interpretation at this time, when we analyze the ordinary contentious process in general, but we should not disregard some subjects that, like this one, when referring only to causes on the status of persons, would seem in principle to be quite specific. On the contrary, we believe that one will not achieve total knowledge of the *res iudicata* in the context of the ordinary contentious process, and in general of any canonical procedural system, without considering the adjudged matter also in processes on the status of persons.

a) *Effects of the formal res iudicata and of the matter in these processes*

In no. 1 of this section, we have set forth the distinction characteristic of modern procedural doctrine between the *formal* adjudged matter and the *material* adjudged matter. Effects that are characteristic of the formal adjudged matter in all canonical processes are the finality of the judgment and the impossibility of directly challenging the judgment (cf. c. 1642 § 1): these effects, resulting from the final judgment, occur in causes on the nullity of marriage (cf. cc. 1684 and 1685) and also in causes on nullity of the sacred ordination by specific provision (cf. c. 1712). Therefore, in processes on the status of persons, we have the efficacy of a formal adjudged matter in their judgments that acquired finality.

One might wonder if c. 1643 refers, in the absolute terms of it denial, only to the material adjudged matter, not sufficiently distinguished from the formal adjudged matter in cc. 1641–1642. Previously it was stated, however, albeit not with the same terminology, that the effects of the material adjudged matter come to be described in the text of c. 1642 § 2: declared nullities, in the matrimonial process as well as in that of the sacred ordination, consequently come to be law for the parties to the extent that in the first case, the spouses, after dual conformity, once notice of the confirming judicial declaration has been served, may contract a new marriage (cf. c. 1684 § 1), and in turn, whoever had considered himself clergy, after

the second judgment confirming nullity, loses all the rights of the clerical status and is free of all obligations (cf. c. 1712). These effects are not only an executory consequence of the respective judgments of nullity once confirmed, and therefore we include them in the formal adjudged matter, but also a manifestation of an external juridical-canonical situation, regarding the status of persons, officially and publicly verified by concrete law pronounced by the judgment.

b) *The "exceptio rei iudicatae" and the new presentation of the case*

However, there is still doubt as to whether, after the dual conformity of the respective nullities—i.e. of marriage and sacred ordination—pertaining to the state of the persons, there is also that effect that is so characteristic of the material adjudged matter, which is the possibility of filing the *exceptio rei iudicatae*, or its ex officio determination as established in c. 1642 § 2. This unknown is resolved by c. 1644 when it regulates the only possible recourse against a judgment on the status of persons with dual conformity. Although externally it could have some element in common with the appeal, which is the competence of the appellate tribunal, nevertheless, the recourse is by nature quite distinct: it is an extraordinary recourse against a final judgment, which must of necessity be based on *novis iisque gravibus probationibus et argumentis*, which must be adduced by the appellant and proven before the judge in order that the judge decide whether to admit what c. 1644 designates with the terms *nova causae propositio*. Consequently, if those reasons, thus classified by the *CIC*, are not perceived as new and grave by the appellate tribunal, before whom the *nova propositio* was lodged, the recourse will not be admitted by said tribunal. Non-admission of the new proposition of the cause is identified with the effect of the *exceptio rei iudicatae.*

A judgment on the status of persons, duly confirmed, enjoys finality, which generates the effects characteristic of a formal adjudged matter. And also those of the material adjudged matter, although this latter has been conditioned on the *subsequent appearance of some new and graver reasons or evidence* that were not alleged or proven in the opinion issued by the respective tribunals of instance when deciding or confirming the judgment on the status of persons. As opposed to the wording of c. 1643, then, there was an adjudged matter in causes on the status of persons, even if this adjudged matter is conditioned by a possible subsequent event: the adducing and proving of new reasons or the presentation of evidence not previously judged. Therefore, as long as this event does not occur, the adjudged matter exception maintains its full efficacy.

In compliance with c. 1643, it could be concluded that there is an adjudged matter in causes on the status of persons when there are two conforming definitive resolutions, provided that new and grave reasons or evidence not submitted to trial is not alleged and proven before the appellate tribunal. If, on the other hand, it is accredited in the admission phase, the *exceptio rei iudicatae* fails, and there will be a new review of the cause.

V. INCIDENTAL CASES AND OTHER INCIDENCES

To conclude the description of all the various procedural phenomena contemplated and regulated in this section, we must refer to those included under title V, under the heading *De causis incidentibus.* This covers, in addition to the incidental matters in strict terms of cc. 1587–1591, two specifications: in chapter I, *De partibus non comparentibus* (cc. 1592–1595), and in chapter II, *De interventu tertii in causa.*

1. *Incidental cases*

Regarding incidental causes *in general,* we should emphasize the precision with which its concept is formulated; the method of proposition; the indication of the nature of the decree of admission or rejection, which must be pronounced *expeditissime,* which results in being unappeasable (cf. c. 1629,5°); the characterization that must be given by the judge or tribunal regarding the seriousness of the incidental proceeding and of the type of judicial resolution by which it must be decided, which will also influence the procedure to be followed and even the possibility that the incidental matter can be entrusted to an auditor or to the presiding judge of a collegiate tribunal; it must also be decided whether the incidental proceeding must be handled as a preliminary and special pronouncement or, on the other hand, only as a special pronouncement to be resolved together with the definitive judgment. Lastly, c. 1591 establishes the revocability or at least amendable nature of every incidental resolution, after hearing the parties, that has arisen at the instance of these parties or even ex officio, which will nonetheless present some problems.

2. *Case of the parties not appearing before the judge*

Regarding the parties' failure to appear, the concept of contempt (cf. cc. 1842–1851 *CIC*/1917) has been replaced with an interpretation that classifies appearance by the respondent to the judge's summons as a procedural obligation. If the party does not face up to it, this will not cause the process to be interrupted. The absent party cannot avoid submission to the dispute and prejudicial effects of the judgment. Moreover, there is a provision for appearing at any point before the resolution of the cause and for the absent party's options for challenging the judgment. Lastly, there is a provision for the absence of the plaintiff, which entails some effects pursuant to c. 1594,2°, after a new summons, which have more of a sanction for the lack of diligence than a proper consequence entailed in the fact that one is not meeting a procedural obligation.

3. *Participating third party*

Regarding the participation of third parties, we will only note the broad concept of standing (*Is cuius interest*, according to c. 1596 § 1) to participate as a third party in a proceeding to which one is not a party. The elements of voluntary participation that can take place are broad, pursuant to c. 1596. After hearing the parties, the judge may ex officio, summon a third party because he believes that the person's participation is necessary. The broad framework offered by cc. 1596 and 1597 makes it possible to guarantee the defense of interests provided in the procedural institution of third-party intervention.

4. *Right of appeal*

An incidental proceeding not included in this section is the *De iure appellandi*, regulated by c. 1631. It is lodged directly before the appellate tribunal. It must be handled according to the norms of the oral contentious process and judged *expeditissime.*

5. *Judicial costs*

Although one finds other provisions in the *CIC* with respect to judicial costs (for example, c. 1571 related to witnesses, c. 1580 regarding experts, c. 1525 on the costs of the process in the event of a waiver of the process or of the cause, and c. 1595 on the absence of the parties), title X of this section gives the bishop governing the tribunal the power to establish norms regarding financial issues such as the order to pay judicial costs, the establishment of advocates', procurators', experts' and interpreters' fees, witness compensation, free legal aid or reduction of costs, the payment of damages, and deposits or guarantees to be furnished. It also provides for recourse that can be lodged within these procedures. It shall be lodged before the same judge when it is formalized outside of the ordinary appeal of the judgment.

TITULUS I
De causae introductione

TITLE I
The Introduction of the Case

INTRODUCTION

Rafael Rodríguez-Ocaña

1. Book IV of the *CIC*/1917 included a title VI, under the same name ("Introduction of the Case"), within the part called "Trials," in its first section, "Trials in General." That title was divided into two chapters, one on the petition and the other on the summons and notification of the judicial acts.

The *CIC* retains the names designating title and chapters, but it has varied the introduction of the cause's location in the organization, within the general ordering carried out throughout book VII of the *CIC* (see introduction to book VII). Now, the introduction of the cause, with its two chapters on the petition and the summons respectively, belong to the sphere of the ordinary contentious trial.

2. The process, understood "as a series or succession of juridical and formal acts conducted before an ecclesiastical tribunal, by virtue of a cause of action …,"[1] is usually divided into sections according to the objective sought by the legislator through the acts that correspond to each phase of the procedural *iter.* However, the *intra*-procedural divisions, in some cases, do not have very precise limits, and are also closely dependent on any doctrinal approaches maintained by each author on the juridical nature of the process, and the initiation and subsequent development of the juridical-procedural relationships. This implies that, for some authors, the introduction of the cause is restricted by a series of proceedings limited to the presentation of the libellus, while other authors believe that this procedural step must be extended to the proper evidentiary phase.

1. C. DE DIEGO-LORA, commentary to Pars I: *De iudiciis in genere*, in *Pamplona Com.*

The legislator seems to adopt a more practical criterion that is also distanced from its own doctrinal statements concerning the birth of the instance. In fact, for the *CIC*, the process) begins with the summons (c. 1517). This is different from the criterion found in c. 1732 *CIC*/1917, which situated the beginning of the procedural relationship at the *litis contestatio*. The option adopted by c. 1517 implies that the introduction of the cause must include what is involved in the petition and the summons, as well as the instance itself, then would come—once the instance began—the *litis contestatio*, evidence, *etc*. The practical sense prevails over the theoretical sense; thus, the succession of the first titles of the *CIC*, in the discussion of the ordinary contentious process, must be: title I: libellus and summons; title II: *litis contestatio*; title III: the judicial instance. That is the same order found in the *CIC*/1917.

3. The number of canons dedicated to title I on the introduction of the cause in the *CIC*, compared to the number reached in the *CIC*/1917, is significant, due to the drastic reduction.

In the chapter dedicated to the petition, there is one more canon. The *CIC* contains six, and the *CIC*/1917 regulated this area in five canons. In Chapter II, the fifteen canons of the *CIC*/1917 have been reduced to six in the *CIC*. The summons and notice of judicial acts appear as one more of the cases affected by the work of "formal and practical" simplification[2] carried out in the code revision. Although doctrine has praised[3] the work done, it indicates that, in the case of the summons, the lack of more specific norms, when the particular law referred to in c. 1509 § 1 is missing, may give rise to situations in which there is a lack of precision and stability[4] in an area affecting the *ius defensionis* and the principle of equality of the parties.

4. In the chapter dedicated to the libellus of the lawsuit are found relevant innovations that favor an enriching doctrinal debate regarding some precise issues, even if we still lack an—always relevant (*PB* 126)—opinion from Rotal jurisprudence.

a) Through a new canon, the validity of the principle of public or private party initiative in the constitution of the process is expressly regulated (c. 1501). This new norm, with the same internal structure of the process, strengthens the impartiality of the Church organs of justice, makes judicial protection depend on the optional right to action, in that it contains a specific request, stresses the *instrumentality* of the process in its constitution, which implies that justice in the canonical system—at least at this point in the proceedings—is a "pleaded justice," and, lastly, establishes the bases for doctrinally defending a concept of the right to

2. Cf. M.F. POMPEDDA, "Diritto processuale nel nuovo Codice di diritto canonico. Revisione o innovazione?," in *Ephemerides Iuris Canonici* 39 (1983), p. 218.

3. Cf. ibid.

4. Cf. C. DE DIEGO-LORA, commentary to c. 1509, in *Pamplona Com.*

action that depends less on subjective rights and is more in accordance with the legitimate interests of the parties.

b) The first acts of the process allow a certain diminution of the principle of writing through acceptance of an oral plea (c. 1503). The canon contains guidelines that are distinct from those maintained by c. 1707 *CIC*/1917, because now the possibility of orally suing is based on the judge's discretion. Criteria defining when a cause is easy to investigate and of less importance are lacking; the only indication given by the *CIC*/1917 ("which, therefore, must be resolved quickly") has completely disappeared from the current canon. The norm has an unquestionable practical importance, given the proliferation of cases in which the judge is turned to for solutions to irregular, problematic, or questionable situations, which are fundamentally matrimonial. In these cases, the judge must take care to remain impartial, providing solutions pursuant to legislative provisions (c. 1446 §§ 2 and 3), but without avoiding or compromising his neutrality.

c) Technically speaking, c. 1504 more appropriately regulates the requirements of the content of the petition. In the new norm, they underlie, on the one hand, the *procedural presuppositions* as requirements of justice that must be present in the petition, and, on the other hand, the need for the plaintiff to support the *fumus boni iuris* of the petition through the *factual* and *normative* elements of the *causa petendi*. The formulation of the canon allows one to establish, on a doctrinal level, the influence of theories of individualization or substantiation in the analysis of the elements making up the *causa petendi*. In general, the legislator favors a nuanced substantiation, where the facts making up the factual situation acquire greater relevance to the detriment of the normative element of the cause or cause of action.

d) Admission or rejection of the petition is reserved to the sole judge or the presiding judge of the tribunal (c. 1505 § 1), whereas in the *CIC*/1917 the petition was within the competence of the college. The norm still is a reason for establishing the limits of the activity after it is developed by the judge for admitting or rejecting the petition, which practice is becoming increasingly widespread and which is in danger of becoming a pre-process on the merits of the case. This is because c. 1505 § 2,4° provides that the petition will be rejected if the claim lacks any foundation, which was not expressed in c. 1709 *CIC*/1917. An important innovation is the current regulation on the recourse against the decree rejecting the libellus (c. 1505 § 4), in which the preliminary requirements that the parties be heard have disappeared (c. 1709 § 3) in the trying of the recourse. As for the rest, there is still controversy regarding the possibility of lodging the extraordinary remedy of *restitutio in integrum* against the unappealable decree of rejection of the libellus. Neither doctrine nor jurisprudence maintains a common opinion. There are writers and Rotal decisions that admit the *restitutio* due to the definitive effect of the unappealable decree of rejection of the petition, but other writers and Rotal decisions reject the

extraordinary recourse, because they believe that this recourse not only requires a judicial resolution with definitive force, but also that it must bear on the foundational issue. In short, what the various postures reveal is a different concept of what *res iudicata* is in the canonical process, and, depending on this conception, the possibility of whether or not to admit *restitutio in integrum* against some judicial decisions.

e) The doctrinal problems and practical ineffectiveness of c. 1710 *CIC*/1917 have led the legislator to introduce a new juridical figure, in the context of the admission of the petition, for the purpose of counteracting the judge's delay in issuing the decree of admission or rejection. That new juridical institution is the admission of the libellus, *ope legis* or *ipso iure* (c. 1506). Together with the various points, in connection with the interpretation of the canon, there is an aspect of the applicability of the norm—that is, if its potentiality is extended to every type of process—regarding which part of a doctrine maintains a clearly restrictive posture, when stating that the admission *ipso iure* does not apply to special processes declaring nullity of the matrimonial bond (see commentary on c. 1506).

5. There are two basic reasons supporting the formal and practical simplification, in addition to the norms, that the legislator has introduced to the canons contained in the chapter dedicated to the summons and notification of judicial acts:

a) the means through which notification or announcements are made, the summons in the strict sense as well as other judicial acts, come down to one—the public postal service—in order to leave to particular law the task of providing norms regulating other means (c. 1509 § 1). The role of particular law seems relevant concerning this subject, due to the differences between the countries with respect to their level of development. Canonical legislation finds here a difficult obstacle to overcome if it is not through the invocation of particular law; whereas, in that it is delimited within a specific nation, the civil procedural law of each country can handle in a more detailed manner the regulation of the means of notification of judicial acts; therefore, a norm of reference could be very useful;

b) the second reason explaining the practical simplification of the procedural institution of the canonical summons comes from the obligation to attach the petition to the summons, unless grave reasons warrant a postponement, until the party declares, of the procedural step for learning of the libellus through the *pars conventa*. The provision of c. 1508 § 2 entails a notable advancement in the sphere of juridical guarantees that corrects the practice used until now. The normative effect that this fact involves is translated into an exoneration of the canonical legislator from the burden of specifically regulating the formalities and requirements of the summons. These requirements, divided by doctrine into two groups—*vocatio in iudicium* and *editio actionis*—are largely met by the petition attached to the summons. Therefore, it will be sufficient to

indicate the place, time and manner—appearance or written answer to the complaint—adopted by the judge.

6. Chapter II also presents other characteristics that should be highlighted.

a) The summons of the respondent appears more clearly as a jurisdictional act of the judge. Although canonical doctrine has distinguished the classical Latin term that indicated the summons—*vocatio in ius*—from its *ius-privatist* origins, this term persisted in Roman law—even once the *in iure* phase disappeared from the ancient Roman process, from which the term *vocatio in ius* comes—as in canon law. The *CIC*/1917, in c. 1711 § 1, stated "libello vel orali petitione admissa, locus est *vocationi in ius* seu citationi alterius partis." The *CIC* exchanges the ancient expression for the more accurate *in iudicium vocare* (c. 1507 § 1), which stresses—as manifested in its origin in the Roman process—the jurisdictional and public nature of the summons performed by the judge.

b) The summons is ordered *in the same decree* in which the complaint is admitted. In cases of *ipso iure* admission, the summons decree will be independent because the admission took place, not by judicial decree, but *ope legis*. There is the possibility that the summons may be completed by a second decree order, if the judge infers, from a consideration of the answer to the complaint, that it is necessary to summon the parties. This second decree has a specific purpose: appearance before the judge.

c) The respondent has the right to see the complaint, unless, due to grave reasons, the judge decides not to attach it to the summons. In this case, the decree of summons must contain the reasons explaining this way of proceeding. In those cases, the summons decree shall become part of the decision-making decrees, and the provision of c. 1617 will apply: a lack of reasoning shall imply a lack of efficacy of the summons decree. A summons decree of this kind involves a limitation on the exercise of the respondent's right to see the libellus before declaring in the process.

d) With respect to nullity of the summons decree and its consequences, the appearance by the respondent before the judge to handle the cause corrects any possible defects in the summons and even its absence, because, as indicated by the legislator, with the actual appearance, "the summons is not necessary" (c. 1507 § 3). Moreover, the appearance of the respondent nonetheless has some correcting limits that are restricted to the manner and execution of the act of summons, without including, on the other hand, the cause of the summons. Thus, for example, if the summons decree is ordered by an incompetent ecclesiastical judge, the presence of the party does not act, in principle, as an extension of the competence in favor of the tribunal who summoned the party (cf. c. 147 § 1). Even if the *CIC* does not include any express classification of the nullity of a judgment made through a defect in the summons (that is, whether or not it is remediable through the judgment), there are phenomena

recognized thus by Rotal jurisprudence in which the denial of the right to defense due to a defect in the summons or through an unlawful declaration of the absence of a party can be adduced. In both cases, the judgment would be null with irremediable nullity (c. 1620,7°).

7. In the current *CIC*, the basis of the summons authorizes its need to be maintained in second and subsequent instances. For matrimonial causes, *Provida Mater* 123 provided that, at the appeals grade, one should proceed without omitting the summons or the establishment of the issue. Before the *CIC*, jurisprudence maintained consistent doctrine regarding the need to summon the respondent in each instance, without distinguishing between the first and the rest.[5] Writers of recognized prestige are still defending this position.[6]

5. Cf. A. STANKIEWICZ, "De citationis necessitate et impugnatione," in *Quaderni Studio Rotale* 4 (1989), p. 85.
6. Cf. ibid., pp. 85–86.

CAPUT I
De libello litis introductorio

CHAPTER I
The Petition Introducing the Suit

1501 **Iudex nullam causam cognoscere potest, nisi petitio, ad normam canonum, proposita sit ab eo cuius interest, vel a promotore iustitiae.**

A judge cannot investigate any case unless a plea, drawn up in accordance with canon law, is submitted either by a person whose interest is involved, or by the promotor of justice.

SOURCES: *SN* can. 226

CROSS REFERENCES: cc. 221, 1430–1431, 1434, 1452–1453, 1476, 1491, 1502, 1518,1°, 1524, 1596 § 1, 1600, 1620, 1622, 1628, 1646, 1674–1675,1°, 1686, 1696, 1708, 1713–1716, 1721, 1729

COMMENTARY

Rafael Rodríguez-Ocaña

1. The legislator has set forth in this canon the procedural principle of party initiative, a long-standing tradition in canonical procedural law, expressed in the traditional formulas *nemo iudex sine actore*; *nemo iudex in causa propria* and *ne procedat iudex ex officio*. Although the principle of party initiative was also found in c. 1706 *CIC*/1917 (*qui aliquem convenire vult, debet libellum competenti iudici exhibere*[1]), the current provision is technically more accurate, since it stresses that the canonical process, in its structure, depends exclusively on an act—the

1. Cf. M.F. POMPEDDA, "Diritto processuale nel nuovo codice di diritto canonico. Revisione o innovazione?" in *Ephemerides Iuris Canonici* 39 (1983), p. 215.

formal requirements of which are regulated by canon law for each type of process—by a legitimate private or public party, who has an interest deemed to be capable of being protected by the canon system.

Canon 1501 functions on a substantial "constitutional" planefor the process. It emphasizes what the right to procedural action is, through the formal act of a claim, which exclusively makes it possible for judicial power to initiate its protecting function through the process, without confusing the claim with the expression of it in the libellus. By contrast, c. 1706 of the *CIC*/1917, centered on the libellus alone.

Consequently, ecclesiastical judges and tribunals cannot perform their protecting activity until it is requested by those for whom canon law has recognized the respective right to procedural action, which arises in the world of juridical-material relationships, when a subject is in an irreconcilable situation in which his or her legitimate interest cannot be satisfied, because it is opposed or resisted, by the interest of a third party.

2. Although c. 1501 is situated between the canons regulating the ordinary contentious process, it should be stressed that the norm applies to every type of process,[2] provided that the judicial process is understood "as a series or succession of juridical and formal acts conducted before an ecclesiastical tribunal, by virtue of a cause of action—considered as a claim—formulated correctly, with a *fumus boni iuris*, by one subject against another, which proceedings are intended to obtain a binding declaration or acknowledgment, juridical constitution, or imposition of behavior with regard to matters and persons subject to the juridical authority of the Church."[3]

Within the category of processes needing the request of a party for establishment are found, among others: the ordinary contentious process (cc. 1502 ff.); the oral contentious process (cc. 1656 ff.); the contentious-administrative process (c. 1445 § 2 and *PB* 123); the process declaring nullity of marriage (cc. 1671 ff.); the documentary process (cc. 1686 ff.); the process on the separation of spouses (cc. 1692 ff.); the process for the declaration of nullity of the sacred ordination (cc. 1708 ff.); and the criminal process (cc. 1717 ff.). Consequently, according to the canon, there is no process that the judge can initiate *ex officio, nullam causam cognoscere potest.* The development of a process created without the request of the party and the resulting judgment would suffer from the defect of irremediable nullity, pursuant to c. 1620,4°.

With cc. 1501 and 1620,4°, the canonical legislator guarantees the impartiality of the judge in hearing the cause from its very initiation.[4] This impartiality, even considering any good qualities that the judge may have,

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2. The principle is "*basic,* generally applicable to all types of canonical trials": C. DE DIEGO-LORA, commentary on c. 1501, in *Pamplona Com.*

3. C. DE DIEGO-LORA, commentary Pars I. *De iudiciis in genere,* in *Pamplona Com.*

4. Cf. J.Mª. PIÑERO CARRION, *La Ley de la Iglesia,* II (Madrid 1985), p. 495.

his professional competence, or the personal and zealous pursuit of independence, is nonetheless strengthened from its internal structure in the process itself, in that the existence and objective of the exercise of the action is made to depend on party initiative.[5]

3. The principle of party initiative in the constitution of the process extends its influence throughout its development, being the basis of more than a few procedural institutions that the parties can adopt as a function of their legitimate interests:

a) the first consequence is the *instrumentality of the canonical process*, which will only begin when the subject wants to make use of his or her right to action, in that it is an optional right, to judicially protect his or her legitimate interests. In Spain, this aspect of the dispositive principle traditionally is called "pleaded justice" or "petition"[6];

b) as a second consequence, the object of the canonical process is determined by whatever the plaintiff decides to submit to the judgment of the tribunal, and as a function thereof, the plaintiff will set forth the factual and legal bases supporting the claim. With the answer of the respondent (based on his or her dispositive power), the object will be definitively shaped, and as a function thereof, the subsequent evidence and allegations will be articulated;

c) in the third place, the respondent's acquiescence and the plaintiff's waiver of the action are the fruit of the dispositive power, intimately related to the principle of party initiative. Both are unilateral acts by which the respondent yields to the plaintiff's petition, demonstrating agreement therewith; and the plaintiff gives up the exercise of his or her right to protection in that specific case, respectively. For the waiver to be possible, the object must be under the party's power of disposition. Acquiescence and waiver are binding on the ecclesiastical judge under the conditions established by law;

d) fourth, we could also place under the influence of the parties' initiative, albeit within limits, the procedural phenomenon of the renunciation of the instance (c. 1524) and partial renunciation of procedural acts (c. 1524 § 1). Limitations on those two procedural positions of the party are represented, first, by the bilateral nature of the act of renunciation, which must be requested by one of the parties, and the other at least must not challenge it and it must also be approved by the judge (c. 1524 § 3); second, through the principle of acquisition, by which every act requested and incorporated into the process is outside of the dispositive power of

5. Cf. C. DE DIEGO-LORA, "Independencia y dependencia judiciales en el nuevo Código," in idem, *Estudios de Derecho procesal canónico*, IV (Pamplona 1990), pp. 86–92; 100–105.

6. Cf. A. DE LA OLIVA-M.A. FERNÁNDEZ, *Lecciones de Derecho procesal*, I, 3rd ed. (Barcelona 1986), p. 91.

the parties, and one can only waive it before said incorporation takes place;

e) the fifth consequence is manifested in the possibility of ending the process through settlement or arbitration, provided that the law so allows (see commentary on cc. 1713–1716);

f) the sixth derivation of the principle of party initiative is manifested in the judgment, which must be *consistent* with the claims of the plaintiff and of the respondent. A lack of consistency in the judicial decision that does not resolve the dispute, not even in part, pursuant to c. 1620,8°, affects the judgment, making it null and irremediable.[7]

4. The instance of a party must be related to the ex officio initiative that has a relevant role in the canonical process.[8] Once the cause is presented, the legislator regulates the judge's impetus on various levels: first, to avoid an excessive delay in the administration of justice (c. 1453); second, in order that the judge can have all necessary information, he determines when he believes that the cause has been sufficiently instructed (c. 1600 § 1,1°–2° and § 2); and third, to avoid a gravely unjust judgment (cc. 1452 § 2, 1600 § 1,3°). Together with these points, the judge's impetus will be governed by the general principle of initiative of c. 1452 § 1, which tends to favor either the parties or the judge, depending on the nature of the interest or object of the process.

5. A subject other than the judge who will hear the case must submit the plea by which the process is initiated. This subject will be the interested party or the promoter of justice.

With the expression "proposita sit *ab eo cuius interest*," the canon personalizes the action without referring to the subjective rights as the basis of protection. If, from c. 1491—every right is protected by an action—it is possible to infer that the legislator maintains the traditional position of basing the action, that is, the power to turn to the tribunals of justice requesting juridical protection, only with the existence of the rights possessed by the subjects through the canonical system, the statement of c. 1501 nevertheless supports the position that a *legitimate interest* is sufficient for the right to action to be born, and, with it, recourse to the judge demanding specific protection.[9]

It seems that acceptance of the *legitimate interest* is basic to understanding the present system of protection offered by the judicial function in the Church through the process. Based on this interest, which arises from uncompromising juridical situations existing prior to the process itself—either because there is an interest contrary to that of a third party, or

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7. Cf. J.L. ACEBAL, commentary on c. 1501, in *Salamanca Com.*

8. Cf. J.Mª. IGLESIAS ALTUNA, *Procesos matrimoniales canónicos* (Madrid 1991), p. 165.

9. Cf. C. DE DIEGO-LORA, "La tutela procesal de los derechos en la Iglesia," in *Ius Canonicum* 34 (1994), pp. 59–60.

because the system holds that it can only be solved through judicial means, eliminating the option of settlement solutions—the faithful may exercise their right to the protection offered by the process. Therefore, we have the subjective identification of who has active standing,[10] even if that standing does not later become the standing that is specifically determined by the party to the process. This is because the legislator, supported by various reasons (common good, capacity, etc.), can reserve it for given subjects. This occurs, for instance, in causes declaring the nullity of marriage, in which active standing is limited to the spouses and the promoter of justice (see commentary on c. 1674).

In other procedural phenomena, there is a reference to the interest as a party's right to standing. Thus, the subject or subjects with standing to lodge and pursue an appeal are those who believe their interests have been prejudiced by a judgment (c. 1628); with the intervention of a third party—as a party or secondarily—one is attempting to protect any interest that this party has in the cause and the prejudice that could be caused by the judgment pronounced in the process (c. 1596 § 1); and, lastly, if the cause had not concluded and one of the parties in the process dies, changes status, or ceases from the office by which he or she is acting, it is admitted that the interested party with standing can appear as a substitute for the party (c. 1518,1°).

6. It would have been sufficient for c. 1501 to refer to the interested party as the subject with standing to file the plea that constitutes the initiation of the canonical process. The term is sufficiently broad to make room for private party initiative as well as public party initiative. This is because a plea from the promoter of justice before an ecclesiastical tribunal is not allowed unless it is based on the same procedural action. The initiative of the promoter of justice, according to de Diego-Lora, "remains an *ex parte* initiative, even if the party is public."[11]

The difference between the promoter of justice and the interested party, with respect to standing, is that the promoter of justice, in all cases, is a representative who turns to the tribunal in defense and protection of the public good of the Church.[12] Strictly, it is the Church that is the subject with a legitimate interest to be protected, not the promoter of justice, who will further his initiative as regulated by procedural norms and, on other occasions, in accordance with indications received from the bishop (cf. cc. 1430–1431).

According to common law, the promoter of justice can challenge a marriage (c. 1674,2°); he must intervene in causes on the separation of spouses (c. 1696: the provision does not say, however, that he may initiate

10. Cf. K. LÜDICKE, commentary on c. 1501, in *Münsterischer Kommentar zum Codex Iuris Canonici* (Essen 1989).

11. Commentary on c. 1501, in *Pamplona Com.*

12. Cf. K. LÜDICKE, commentary on c. 1501, cit.

the cause); he is the only person with active standing to exercise a criminal action before the competent tribunal (c. 1721), while the affected private parties, although objectively they have an interest resulting from prejudice incurred by the crime, in the canonical criminal process do not enjoy party status; the most that they can do with their initiative is present a contentious claim for damages caused to them, which action is independent of the criminal action (c. 1729).

We have yet to indicate the case of processes declaring nullity of the sacred ordination. For these causes, c. 1708 expressly provides that interested parties are—in addition to the cleric—the ordinary to whom he is subordinate and the ordinary of the diocese where he was ordained, eliminating the possible initiative of the promoter of justice. In his commentary on the canon, del Amo believes that the promoter of justice could also request nullity "when it is a case of nullity that is public and the exercise of orders gives rise to scandal or causes serious harm to religion and the salvation of souls ... In any case, the problem is not too difficult because it is sufficient for the promotor of justice to inform the ordinary about the case in order that the latter might make the accusation."[13]

In my opinion, in order to offer a solution in accordance with c. 1501, now under commentary, first the nature of the interest giving standing to the ordinary must be resolved (of the cleric or of the diocese in which he was ordained) for him to be an active party to the process. If we believe that he has a right to initiative as a representative of the public good, it could be maintained that, in processes declaring the nullity of the sacred ordination, because of their importance, the legislator wants it to be the ordinary and not the promoter of justice who directly assumes the competencies that the latter has in common law. It could also be maintained, on the contrary, that the ordinary's active standing comes precisely from the fact that he is the cleric's ordinary or that of the place where he received ordination, which implies an interest—distinct from that held in the public good—that the legislator deems sufficient for being the plaintiff in the process. In these cases, we could tend to maintain the initiative of the promoter of justice as del Amo did. Lastly, it could also happen that the ordinary could accumulate two types of interests, in which case intervention by the promoter of justice could only be feasible if the ordinary should decide to act through his interest that gives him standing as an ordinary, that is, what occurs in the second phenomenon of this ideal classification.

Before moving on to the last point in the commentary on the canon, it seems appropriate to stress that the representation of the promoter of justice defending the public good is not the same thing as the defense of the interests of ecclesiastical public administration. This latter, for

13. L. DEL AMO, commentary on c. 1708, in *Pamplona Com.*

contentious processes, in which it must be a party, has representatives designated in the statutes and proper norms, at central levels of ecclesiastical administration as well as at the diocesan level.

7. Canon 1501 establishes the principle of party initiative *ad normam canonum*. With this phrase, the canonical legislator subjects the initiation of the process to the principle of formal legality.[14] And in the same way that the party initiative, in the constitution of the process, applies to all types of processes (see *supra* no. 2 of this commentary), the principle of formal legality also is valid for all canonical causes entailing the exercise of a right to procedural action.

The principle of formal legality affects the expression of the claim, the competence of the judicial organ to hear said expression, the norms of party capacity ... in short, a vast field of subjects concerning the formal phenomena of the process in connection with its constitution. The absence of any of the requirements demanded *ad normam canonum* can make the claim not viable (cf. 1505 § 2), or give rise to the defect of remediable or irremediable nullity (cf. cc. 1620 and 1622) of any judgment pronounced without taking these requirements into account. For a particular study of the influences of the principle of formal legality, it is necessary to consider the legislator's provisions for each type of process and the common norms concerning all causes as a whole.

14. Cf. C. DE DIEGO-LORA, *commentary on c. 1501, cit.*

1502 **Qui aliquem convenire vult, debet libellum competenti iudici exhibere, in quo controversiae obiectum proponatur, et ministerium iudicis expostuletur.**

A person who wishes to sue another must present a petition to a judge who is lawfully competent. In this petition, the matter in dispute is to be set out and the intervention of the judge requested.

SOURCES: c. 1706; *PrM* 55 § 2

CROSS REFERENCES: cc. 1400, 1405, 1407–1416, 1440, 1444–1445, 1459 § 2, 1460, 1501, 1503–1504, 1588, 1596 § 2, 1619, 1620,1°, 1630 § 2, 1644 § 2, 1646–1647, 1658, 1670, 1673, 1677, 1686, 1691, 1693–1694, 1697, 1709–1710, 1721, 1728

COMMENTARY

Rafael Rodríguez-Ocaña

1. The canon repeats c. 1706 *CIC*/1917 nearly verbatim, a canon that also was used in the drafting of *Provida Mater* 55 § 2 through an adaptation of its terms to matrimonial nullity. Thus, the phrase *qui aliquem convenire vult* was replaced by *qui matrimonium accusare vult*, and *ad deducta iura persequenda* was replaced *by ad matrimonium nullitatem declarandam*. Canon 1706 *CIC*/1917 and *Provida Mater* 55 § 2 are believed to be the sources of the current provision, in which the only change from c. 1706 is the deletion of the phrase *ad deducta iura persequenda*.

In fact, one does not always turn to the judge in a strict claim of rights in the technical sense of the word. It is sufficient for there to be a legitimate interest for one to request intervention by the competent ecclesiastical judge or tribunal in a specific case. To this must be added the clear statement by the legislator that, in addition to the pursuit or vindication of rights, *facta iuridica declaranda* is also an object of the trial (c. 1400 § 1,1°). Regarding this provision, a sector of doctrine maintains that "it should be interpreted in light of its terms of reference, so that no judicial matter submitted to the jurisdictional power of the Church ... should be denied satisfaction before the competent judicial body."[1]

1. C. DE DIEGO-LORA, commentary on c. 1400, in *Pamplona Com.*

In light of the provisions of c. 1501, c. 1502 may be thought unnecessary. I do not find this supposition entirely correct, because I believe that the canon is required by the provision of c. 1501.

The provision of c. 1502, in strict procedural logic, is its corollary. Once the legislator provided that the constitution of the process is exclusively dependent on the act of presenting before the judge through a claim an action arising from the world of juridical-material relationships, a new norm was needed to regulate how a party must *express* his or her claim before the competent judge or tribunal. This claim is the role performed by c. 1502: indicating what means must be employed by the interested party, what essential elements make them up, what its form and objective are, and before whom it must be submitted.

2. *Plea* or *bill of complaint* is the name traditionally given by the legislator to the means by which the claim is presented to the competent tribunal requesting the juridical protection provided by the process. The *complaint* is generally understood to be a document presented to a competent judge, in which the subject's desire to initiate a cause is expressed, making known what objective is being asked of the judge's subsequent decision.

Canonical doctrine has expressed these ideas in its diverse definitions of the complaint. In Lega's opinion, the complaint is *brevis scriptura continens Clare actoris petitionem, et petendi causam*,[2] a definition that has also been adopted by Noval.[3] More recently, several canonists have adopted Chiovenda's definition: "the judicial complaint is the act by which the party, claiming the existence of a specific desire from law guaranteeing a benefit, declares that said desire must be realized, and for this purpose invokes the authority of the judicial organ."[4] Among those who adopt this definition, more or less expressly, are della Rocca,[5] Cabreros,[6] and Arroba.[7]

The libellus of the lawsuit is required by the *CIC* in all strictly judicial processes and recourses, without prejudice to the fact that, under special circumstances, an oral plea can take the place of the complaint (c. 1503). It is necessary for all of the following: the oral contentious process (c. 1658); the process to declare nullity of marriage (c. 1677); the documentary process (c. 1686 speaks of the petition); processes for matrimonial separation (c. 1693 provides which procedure must be followed); processes declaring

2. M. LEGA, *Praelectiones in textum iuris canonici de iudiciis ecclesiasticis*, I/I (Rome 1896), p. 425.
3. Cf. I. NOVAL, *Commentarium codicis iuris canonici*, IV, I (Rome 1920), p. 278.
4. G. CHIOVENDA, *Instituciones de Derecho procesal*, III (Madrid 1936), no. 242.
5. Cf. F. DELLA ROCCA, *Instituciones de Derecho procesal canónico* (Buenos Aires 1950), p. 191.
6. Cf. M. CABREROS, in *Comentarios al Código de Derecho Canónico*, III (Madrid 1964), p. 442.
7. Cf. M.J. ARROBA, *Diritto processuale canonico* (Rome 1993), p. 276.

nullity of the sacred ordination (cc. 1709–1710: the terms of both canons infer that the prayers sent to the competent congregation become a judicial complaint when they submit the cause to a tribunal); the penal process (c. 1721 speaks of the petition of accusation); incidental matters (which, pursuant to c. 1588, are submitted in writing or orally; the intervention of a third party (the third party must submit a document—c. 1596 § 2—in which his or her right to intervene is set forth); the plaint of nullity (it must be proposed: cc. 1619, 1621, 1623, 1625, or interposed: c. 1626); the appeal (which allows oral presentation, c. 1630 § 2); the *nova causae propositio* (c. 1644 § 2 requires a petition); and *restitutio in integrum* (which must be asked of the judge cc. 1646–1647).

Although the *CIC* does not always use the term *petition* or *complaint*, it is implied anywhere we do not find it expressly stated at the beginning of the process or recourse, because, among other reasons, the norms of the ordinary contentious process (and consequently c. 1502) are the *analogatum princeps* for other canonical processes in anything that is not incompatible with the nature of the procedure in question, or that does not go against the express provisions of the *CIC* for said process (cf. cc. 1670, 1691, 1710, 1728).

3. The purpose of the complaint is to start the process in order to *aliquem convenire*. Although some commentaries have stated that the wording of c. 1502 could be more precise,[8] I still believe that the *aliquem convenire* substantially covers what is more defining, because it is impossible to conceive of the existence of a process without the requirement of opposing interested parties.[9] Suing someone presupposes a situation of opposing parties, which of necessity must occur in the process—it is not an invention contrived by the legislator in the process. With these statements, we are not maintaining that the process originates the dispute or conflict between parties. However, this opposition exists *before the process* and lies, at least latently, in the otherness of juridical life. Judicial action arises from this opposition. The complaint, therefore, "as a proper means or instrument for the exercise of the right to action,"[10] transfers that opposition between the parties, which was already present in a factual or purely juridical situation, to the process, with juridical repercussions, the resolution of which is entrusted to the tribunals of justice.[11]

Therefore, the *aliquem convenire* is essential to all petitions because they are complaints. This is true whether the object of the trial is the acknowledgement of certain juridical facts, the declaration of rights,

8. Cf. K. LÜDICKE, commentary on c. 1502, in *Münsterischer Kommentar zum Codex Iuris Canonici* (Essen 1989), nos. 2 and 3.

9. Cf. C. DE DIEGO-LORA, "El control judicial del gobierno central de la Iglesia," in idem, *Estudios de Derecho procesal canónico*, I (Pamplona 1973), pp. 334–335.

10. J.L. ACEBAL, commentary on c. 1502, in *Salamanca Com.*

11. Cf. C. DE DIEGO-LORA, *Poder jurisdiccional y función de justicia en la Iglesia* (Pamplona 1976), pp. 142–150.

or the constitution of new situations through the imposition of active or passive duties of conduct, which will give rise to one of three categories of judgments (declarative, constitutive, or condemnatory), which are commonly admitted by doctrine.[12] Even in the event that both spouses request nullity through a joint complaint, there will always be an opposing party, the defender of the bond. A petition for nullity presented to the competent judge for said situations goes beyond being a complaint[13]; here it is also an expression of the right to action that forms its basis and, once it is presented *ad normam canonum*, it causes a first action by the judge that will result in the decree of admission or rejection. This act involves the first act of jurisdictional protection of the object of the trial.[14]

Inasmuch as the complaint is an exercise of the action or the right to the protection provided by the process, it is made to the ecclesiastical tribunal or judge, because it devolves upon them to offer the protection requested.[15] Therefore, it is sufficient for the complaint to be submitted with the appearance of sound justice, the *fumus boni iuris*. Only then may the formal mechanism of the process begin, the immediate objective of which is to subject the public or private respondent to the jurisdictional organ.[16] From that moment, a series of mutual responsibilities and obligations will be generated to give the judge the necessary elements to satisfy or not satisfy the claim presented through the complaint. Consequently, the complaint is, on the one hand, a request for protection through the right to action, and together with it—inasmuch as jurisdictional protection cannot be requested in the abstract—a vehicle or expression of the particular claim on which the judge is asked to pronounce judgment.

4. In its brevity, c. 1502 sets forth the essential elements that make up the petition[17]: *a)* indicating the object of the dispute; *b)* requesting intervention by the judge.

a) Concerning the first element, one writer[18] has remarked that the canon should have kept the terminology of c. 1400 § 1 and used the phrase *object of the trial* instead of *matter in dispute*. The reason supporting that statement rests on the fact that, although the objective of the petition is *aliquem convenire*, the dispute between opposing parties is only *potential*. It might not arise if the respondent adopts, for example, a position of acquiescence with the plaintiff's claim, or does not even appear, in which case the respondent's activity is objectively unknown, whether in opposition or

12. Cf. F. DELLA ROCCA, *Instituciones de Derecho...*, cit., p. 304.
13. Cf. K. LÜDICKE, commentary on c. 1502, cit.
14. Cf. S. GHERRO, "Diritto alla difesa nei processi matrimoniali canonici," in *Il diritto alla difesa nell'ordinamento canonico* (Vatican City 1988), p. 10.
15. Cf. J.L. ACEBAL, commentary on c. 1502, cit.
16. Cf. C. DE DIEGO-LORA, *Poder jurisdiccional...*, cit., p. 145.
17. Cf. A. STANKIEWICZ, commentary on c. 1502, in *Commento al Codice di Diritto canonico* (Rome 1985), p. 872.
18. Cf. C. DE DIEGO-LORA, commentary on c. 1502, in *Pamplona Com.*

waiving any opposition. In this case, there is still opposition, but no dispute (cf. c. 1592).

The essential objective element that the petition must present to the judge, pursuant to c. 1400, is a juridical matter subjected by the legislator to the jurisdiction of the ecclesiastical tribunals. Any positions adopted by the parties in the course of the process are not relevant in the drafting of the petition. Therefore, the libellus of the lawsuit shall discuss the claim or vindication of rights, the declaration of juridical facts, a sentence due to the commission of crimes or the declaration of penalties and, lastly, administrative contentious issues (see commentary on c. 1400).

b) The second essential element is the request for the judge's intervention: *ministerium iudicis expostuletur*. The petition is intended for the judge because he is the jurisdictional organ and it asks for the juridical protection that the code offers the faithful through the process. In addition, the protection is requested, not abstractly, but intimately related to a given concrete claim.

Therefore, the canon provides that the only thing that can be considered the libellus of the lawsuit is the document submitted to the judge in order that he administers justice in the case in question. As one writer has defined it, the plea is considered a petition when it contains a *vocatio ministerii iudicis*. In short, the petition is essentially a *vocatio iudicis*.[19]

This essential element of the petition is a corollary of the principle of party initiative in the constitution of the process provided by the legislator in c. 1501 (see commentary). The ecclesiastical judge or tribunal cannot, ex officio, initiate a cause if the interested party or the promoter of justice has not requested intervention. A mere account of the facts, questions asked of the judicial vicar on any given case, albeit in writing, and other types of communications therewith, even if they contain some type of objective element or one could be inferred therefrom, do not seem capable of being considered a libellus of the lawsuit, because, in these cases, there is no exercise of the right to procedural action by its holder.

Consequently, the judicial petition is clearly distinguished from the written petition (*preces*) for dispensation of the unconsummated marriage.[20] In the *preces*, the concession of a grace is requested and begged (c. 1697). A right to jurisdictional protection is not being exercised. The process initiated by the unconsummated marriage petition is administrative, not judicial.

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19. S. VILLEGGIANTE, "Il principio del contraddittorio nella fase di costituzione del processo ordinario per la dichiarazione di nullità del matrimonio," in *Dilexit iustitiam* (Vatican City 1984), p. 353, note 8.

20. Cf. L. DEL AMO, *La demanda judicial en las causas matrimoniales* (Pamplona 1977), p. 19, note 2.

5. The canon provides that the plea must be submitted to the competent judge (*debet libellum competenti iudici exhibere*). The canon expressly refers, therefore, to the canonical norms regulating the competence of ecclesiastical tribunals. They are the following:

— of the Roman Pontiff: c. 1405 § 1 (the so-called *major cases*);

— of the Signatura: c. 1445 and *Pastor bonus* 122–124;

— of the Tribunal of the Roman Rota: cc. 1405 § 2 and 1444, *Pastor bonus* 128–129;

— of the CDF: *Pastor bonus* 52;

— criteria for the attribution of competence: cc. 1407–1416;

— on functional or hierarchical competence: c. 1440;

— on matrimonial causes: cc. 1673 and 1694;

— on causes on the sacred ordination: c. 1709.

Among these norms, some refer to absolute competence, and others refer to relative competence. Noncompliance with absolute competence implies that the judgment pronounced in those cases will have the defect of irremediable nullity (c. 1620,1°). On the other hand, relative incompetence entails the unlawfulness of hearing the cause by a non-competent judge and gives rise to the dilatory exception of incompetence that, if not exercised, creates a tacit extension of the competence in favor of a judge who was originally incompetent (cc. 1459 § 2–1460).

6. The general principle is that the petition is submitted to the competent judge in writing[21] and is brief. Doctrine has traditionally held that the term *libellus*, the diminutive of *liber*, implies a brief document,[22] which the plaintiff uses to initiate the judicial process. The written form of the petition is consistent with the principle of writing in force in the ordinary contentious process, although it is tempered with some oral forms.[23] This occurs, for example, with the provision of c. 1503.

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21. Cf. A. STANKIEWICZ, commentary on c. 1502, cit.
22. Cf. L. DEL AMO, *La demanda judicial*..., cit., p. 19.
23. Cf. F. ROBERTI, *De processibus*, I (Rome 1956), p. 469.

1503 **§ 1. Petitionem oralem iudex admittere potest, quoties vel actor libellum exhibere impediatur vel causa sit facilis investigationis et minoris momenti.**

§ 2. In utroque tamen casu iudex notarium iubeat scriptis actum redigere qui actori legendus est et ab eo probandus, quique locum tenet libelli ab actore scripti ad omnes iuris effectus.

§ 1. A judge can admit an oral plea whenever the plaintiff is impeded from presenting a petition or when the case can be easily investigated and is of minor significance.

§ 2. In both cases, however, the judge is to direct a notary to record the matter in writing. This written record is to be read to, and approved by, the plaintiff, and it takes the place of a petition written by the plaintiff as far as all effects of law are concerned.

SOURCES: § 1: c. 1707 §§ 1 et 2; *PrM* 56
§ 2: c. 1707 § 3; *PrM* 56

CROSS REFERENCES: cc. 128, 1437, 1451 § 1, 1452, 1459–1460, 1462, 1464, 1490, 1501–1502, 1504–1505, 1513, 1527 § 2, 1587–1588, 1589 § 1, 1620,4°, 1627, 1630 § 2, 1631, 1658, 1693

COMMENTARY

Rafael Rodríguez-Ocaña

1. This canon has two immediate precedents, as noted in the sources, namely c. 1707 *CIC*/1917 and *Provida Mater* 56. A reading of these norms and a subsequent comparison with the current one reveals that the legislator has changed the criterion maintained until now.

Canon 1707 *CIC*/1917 provided that "any person who does not know how to write or is lawfully impeded from presenting the petition," *proponere potest* the oral plea. This faculty was also granted to the plaintiff in matrimonial causes of nullity (Art. 56 *PrM*). Therefore, it is the plaintiff who fits into some of the factual phenomena contemplated in the norm who was granted the ability to choose between presenting a written petition or an oral plea. This faculty was regulated by § 1 of c. 1707.

Paragraph 2 of c. 1707 provided that the admission of an oral plea was left to the discretion of the judge in causes of minor significance or in causes that could be easily investigated. It did not assume the plaintiff did

not know how to write or was impeded from presenting the petition. This phenomenon was obviously not assumed by *Provida Mater.*

Paragraph 3 of c. 1707 *CIC*/1917 regulated what proceedings the judge should undertake to have the oral plea drafted, then approved by the plaintiff. This paragraph was applied to the cases in paragraphs 1 and 2.

In short, before the *CIC* went into effect, if one did not know how to write, or if there were some impediment to presenting the petition, the plaintiff was allowed to make an oral plea in any cause. The judge could not reject the plea because it was not in writing, if the conditions of the canon were met, including in matrimonial causes (Art. 56 *PrM*). On the other hand, in causes that could be easily investigated, or in causes of minor importance, the judge decided the appropriateness of the oral plea.[1]

Canon 1503 changes this criterion The authority granted the plaintiff to make an oral plea in certain situations for all types of causes, as set forth in c. 1707 § 1, disappears. Canon 1503 sets forth as the only possibility that the judge may admit an oral plea when the plaintiff has an impediment to presenting it in a written form, or when it is a cause that can be easily investigated, or when it is a cause of minor importance. The expression *iudex admittere potest* indicates that it is left to the discretion of the judge to authorize the plaintiff to make an oral plea, or, if he prefers, to allow the exception set forth in c. 1503 regarding the written form that all pleas must have. Even if there is some impediment, or if it is a cause of minor importance, the judge may demand a written plea from the plaintiff.

2. According to the canon, and most commentaries,[2] there are two cases in which the judge can admit an oral plea: *a)* when the plaintiff is impeded from submitting it in writing; and *b)* when the cause can be easily investigated or is of minor significance.

a) The first phenomenon includes a wide range of cases that imply the plaintiff is prevented from writing because he or she is illiterate, or because he or she suffers from a disability that makes writing impossible (illness, maiming, *etc.*). The plaintiff may also have the necessary physical and cultural ability to make a written plea, but be impeded due to difficulties, such as obstruction from third parties.[3] When there is a disability or obstacle, the judge may always admit an oral plea, for *all types of causes*, without limitation.

The problem that arises, unlike c. 1707 § 1 of the *CIC*/1917, is how it considers the judge's denial of an oral plea, if the party believes that the factual situation described in the canon applies. Given the importance of

1. Cf. M. LEGA-V. BARTOCCETTI, *Commentarius in iudicia ecclesiastica*, II (Rome 1950), p. 515.

2. Cf. L. CHIAPPETTA, commentary on cc. 1502–1503, in *Il Codice di diritto canonico. Commento giuridico-pastorale*, II (Naples 1988), p. 620; M.J. ARROBA, commentary on c. 1503, in A. BENLLOCH (Dir.), *Código de Derecho Canónico* (Valencia 1993), p. 661.

3. Cf. M. LEGA-V. BARTOCCETTI, *Commentarius in iudicia...*, cit., p. 513.

the principle of party initiative and the right to protection, non-admission of the oral plea, due to a difference of opinion between the judge and the plaintiff as to whether or not the elements provided by the legislator are present, can be appealed (cc. 1505 §§ 2 and 4). In these cases, if the judge demands a written petition, he is rejecting not the form in which it is submitted, but the plea itself, because the party, due to his or her characteristics, has no choice but to use the oral form.

b) The judge can also admit an oral plea when it is a cause that is easily investigated or is of minor significance. The wording of the canon suggests that both requirements must occur at the same time, because they are joined by the conjunction *et*. Nevertheless, not all writers maintain this opinion, although only indirectly—due to a lack of an express reference to this issuecan they be said to take one position or another. Lega-Baroccetti, Noval, Chiappetta and Pinero, among others, suggest that both requirements must occur simultaneously in the same cause.[4] On the other hand, for Cabreros, Arroba, and Valsecchi, meeting one requirement is sufficient.[5]

The *CIC* does not state which causes are easily investigated or of minor significance. Only on two occasions does it use this term "oral" to refer, first to the proposition of incidental matters (c. 1588), and second to the lodging of an appeal (c. 1630 § 2). Doctrine has held that incidental matters are a clear example that meets the demands of the norm.[6] There is also a common opinion that matrimonial causes cannot be considered of minor significance, although at times they can be easily investigated[7] (e.g., causes that are supported through the documentary process, although they do not always have a reason to be easily investigated). However, an oral plea for nullity can be presented due to the plaintiff's impediment. Causes on the nullity of sacred orders and penal processes cannot be considered of minor significance. It does not seem definitive that, if a cause is classified as easily investigated and of minor significance, the oral process must be used (cf. cc. 1627 and 1693), among other reasons, because in the regulation of said process, the written plea is provided as a general principle (c. 1658).[8]

4. Cf. ibid., p. 514; I. NOVAL, *Commentarium Codicis Iuris Canonici*, IV, I, (Turin-Rome 1920), p. 279; L. CHIAPPETTA, commentary on cc. 1502–1503, cit., p. 620; J.Mª. PIÑERO, *La Ley de la Iglesia*, II (Madrid 1985), p. 497.

5. Cf. M. CABREROS, in *Comentarios al Código de Derecho Canónico*, III (Madrid 1964), p. 445; M.J. ARROBA, commentary on c. 1503, cit., G.P. VALSECCHI, "I processi," in *La normativa del nuovo Codice*, 2nd ed. (Brescia 1985), p. 363.

6. Cf. I. NOVAL, *Commentarium Codicis...*, cit., p. 279. More recently, M.J. ARROBA, *Diritto processuale canonico* (Rome 1993), p. 284, note 22.

7. Cf. L. MATTIOLI, "La fase introduttoria del processo e la non comparsa della parte convenuta," in *Il processo matrimoniale canonico* (Vatican City 1988), p. 213.

8. Cf. M.J. ARROBA, *Diritto processuale...*, cit., p. 284.

The absence of specific criteria for considering when a cause is easily investigated or of minor significance, and the doctrinal opinion that incidental matters generally possess these characteristics allowing the oral plea, could be two reasons supporting the following proposed interpretation: the legislator, in these situations, is referring not so much to the constitution of the principal process through the oral plea, as to the possibility that the parties can orally make their requests to the judge in matters that arise—interposition of an incidental matter (cc. 1587–1588); filing of exceptions (cc. 1459–1460, 1462); the petition for free legal aid (c. 1464), etc.—in the progress of the process that are easily investigated and of minor significance.

This interpretation is supported by an expression used in c. 1707 § 2 *CIC*/1917, which, after indicating that causes must be easily investigated and of minor significance for the judge to allow an oral plea, added, as a summary of both characteristics "that, therefore, must be quickly resolved." The *CIC* orders that the judge quickly resolve some matters that may arise in the *iter* of the process, such as the recusal (c. 1451 § 1); the recourse against rejection of the plea (c. 1505 § 4); the recourse against the decree establishing the doubts (c. 1513 § 3); the petition for admission of evidence (c. 1527 § 2); the admission of the incidental matter (c. 1589 § 1); the issue on the *ius appellandi* (c. 1631). The oral plea would be in line with the rapidity with which the legislator wants these causes to be handled, in order to not excessively delay the principal process or the issue presented.

Consequently, it would turn out that § 1 of the canon contemplates two different cases or phenomena that have a different scope: the first is applied, in a strict sense, to the plea that initiates the process or the main case—causes of nullity, of separation, etc.—and it can be oral if the plaintiff has some impediment. The second phenomenon is applied to other requests that the parties can make to the judge, who can admit them if the issue can be easily investigated and is of minor importance.

3. Paragraph 2 of the canon is a verbatim copy of the provision of c. 1707 § 3 *CIC*/1917, with the additional expression "and it takes the place of a petition written by the plaintiff as far as all effects of law are concerned." This paragraph stresses that the exception of the judge's allowing certain oral pleas pursuant to § 1 does not imply that these pleas have any value at the time, unless they are in writing. The reason lies in the fact that the writing, even if it admits certain accommodations in the ordinary process, "pertinet ad substantiam actuum ... non tantum ad probationem."[9] Therefore, the legislator orders the intervention of a notary in the process, sanctioning with nullity any records not signed by the notary (c. 1437).

9. F. ROBERTI, *De processibus*, I (Rome 1956), p. 469.

Therefore, the oral plea of a party must be put into writing that, once approved by the plaintiff, will take the place of the principal plea—if this is the case—or any other type of petition that had to be in writing (lodging of an exception, interposition of an incidental matter, etc.).

The norm provides that, by order of the judge, it must be the notary who keeps a record of the oral plea. Therefore, the practice whereby the judge himself drafts the petition once he has heard the petitioner is excluded. The canon is clear on this point when it provides that "notarium ... scriptis actum redigere": the expression, in the proper meaning of the words used, requires that the notary, besides signing the act (c. 1437), must also be the one who writes it. For this purpose, the presence of the judge is not necessary, but the mandate of the notary is, as expressly provided in the canon.[10]

In order for the act drawn up by the notary to replace the plaintiff's document *ad omnes iuris effectus*, it must be read to the plaintiff and the plaintiff must approve it. The reading will allow the petitioner to make any changes he or she deems appropriate to more fully record his or her plea, which changes the notary will set down on the act, and they must in turn be ratified by the plaintiff. The canon does not state how the unavoidable requirement of the plaintiff's approval must be recorded. *Provida Mater* 56 provided that the plaintiff would approve the act by making the sign of the cross by him or herself in witness of his or her approval; the notary would attest to the meaning of that sign.

The normal practice, if the plaintiff has no impediment to writing, will be for him or her to approve the act with his or her signature. When that is impossible, the plaintiff must do it orally. In both cases, the notary must attest that, once the act was read to the plaintiff, he or she gave approval with a signature or orally, which requires the presence of the notary at the time of approval.[11]

A lack of or defect in the approval implies that the act cannot take the place of the plaintiff's petition for juridical purposes. The significance of this clause depends on the nature of the document that the act is replacing. In the event that it is a petition (c. 1501), if the process begins without the plaintiff's approval, the judgment pronounced would be null (c. 1620,4°).[12] However, if the document that the unapproved act is replacing is, for example, the proposition of evidence or the filing of an exception, the effect of nullity of that concrete act does not necessarily have to take place. Pursuant to c. 1452, the judge, for reasons of the public good or in order to avoid a gravely unjust judgment, may act ex officio and

10. Cf. M. LEGA-V. BARTOCCETTI, *Commentarius in iudicia...*, cit., p. 514.
11. Cf. ibid., pp. 514–515.
12. Cf. L. MATTIOLI, "La fase introduttoria...," cit., p. 213.

assume as his own the request contained in the act that was not approved by the petitioner.

One might wonder if subsequent approval by the plaintiff is possible, especially in the case of the petition in the strict sense. In the context of the *CIC*/1917, one writer did not see any legal remedy therein. To be specific, it was affirmed that if approval was not requested, whenever the plaintiff had knowledge of the petition "ius habet eumdem repudiandi vel corrigendi si suam mentem genuine no referat; videlicet *repudiandi*, si *subtantialiter* eius intentionem mutet; *corrigendi* si *accidentaliter* erret."[13]

4. The issue brings us to one last point of theoretical, as well as practical, importance: comments made by doctrine, that "the norm—c. 1503—gives rise to certain problems, because the petition introducing the suit (c. 1504) is a document that must meet numerous formal requisites. The notary must include all of these in the record that is prepared. It is also an act which gives expression to a legally based request of the plaintiff; the determination of conformity with the juridical requirements is not, however, the function of a notary."[14]

First, is the act formally a petition which must cover all the requirements imposed by the *CIC*, or does the legislator liken the act to the petition without the need to subject it to the formal requirements of c. 1504, understanding that it is sufficient for the act to "indicate the object of the dispute and to request intervention by the judge" (c. 1502)?

Even in this situation, which would release the notary from a task that would go beyond attesting to the oral plea through the transcription, there is still danger of undermining the office of the notary by adding to his specific functions those characteristic of the legal representative, that is, those of an expert jurist who gives legal advice to the party in his or her relationship with the ecclesiastical tribunal. There is also a risk that the judge's intervention at these moments may exceed the limits of the mandate and intervene with his counsel in the drafting of the act, compromising the impartiality of his ministry, or converting the act to an *inquisitio praevia*[15] or then committing to the decision to admit the petition or reject it, which he must decree later (c. 1505).

The practice of the tribunals highlights that the times that the faithful come to set forth their problems, especially matrimonial problems, with the desire to find a solution on the juridical plane as well as in their conscience are not rare. On the contrary, there is no shortage of occasions in which, due to advice given, the faithful decide to lodge a plaint of nullity

13. M. LEGA-V. BARTOCCETTI, *Commentarius in iudicia...*, cit., p. 514.

14. C. DE DIEGO-LORA, commentary on c. 1503, in *Pamplona Com.*

15. Cf. M. WEGAN, "'Reiectio libelli' und 'ius defensionis' der klagenden Partei," in *Iustus Iudex* (Essen 1990), p. 618.

before the tribunal, which will be admitted in its oral form if the situation includes the impediments and obstacles considered in canon 1503. It seems appropriate, therefore, to specify the necessary means for avoiding any partiality in the decision made by those who have the duty to judge the cause through the juridical-pastoral care offered to the faithful and the subsequent presentation of the petition. The best means for achieving this is to limit their pre-process intervention, leaving that advisory function to the promoter of justice or the legal representatives (c. 1490), which can be extended, without any risk of partiality, to the essential points that must be contained in the act drafted by the notary upon a legitimate oral plea.

Lastly, it should be indicated that negligence on the part of the notary in the performance of his office, if causing damage to another, is subject to punishment by the judge (c. 1457). It may also result in a petition for reparation of damages (c. 128) should the act be rejected due to any deficiencies due to the notary's inexperience.[16]

16. Cf. M. LEGA-V. BARTOCCETTI, *Commentarius in iudicia...*, cit., p. 515.

1504 **Libellus, quo lis introducitur, debet:**

1° exprimere coram quo iudice causa introducatur, quid petatur et a quo petatur;

2° indicare quo iure innitatur actor et generatim saltem quibus factis et probationibus ad evincenda ea quae asseruntur;

3° subscribi ab actore vel eius procuratore, appositis die, mense et anno, necnon loco in quo actor vel eius procurator habitant, aut residere se dixerint actorum recipiendorum gratia;

4° indicare domicilium vel quasi-domicilium partis conventae.

The petition by which a suit is introduced must:

1° state the judge before whom the case is being introduced, what is being sought and from whom it is being sought;

2° indicate on what right the plaintiff bases the case and, at least in general terms, the facts and proofs to be evinced in support of the allegations made;

3° be signed by the plaintiff or the plaintiff's procurator, and bear the day, the month and the year, as well as the address at which the plaintiff or the procurator resides, or at which they say they reside for the purpose of receiving the acts;

4° indicate the domicile or quasi-domicile of the respondent.

SOURCES: c. 1708; *PrM* 57

CROSS REFERENCES: cc. 97–99, 102–107, 113 § 2, 1400–1401, 1405–1416, 1458, 1478–1479, 1482, 1484, 1493–1495, 1501–1503, 1505–1506, 1513, 1526–1586, 1620, 1644 § 1, 1677

COMMENTARY

Rafael Rodríguez-Ocaña

The sources that inspired this canon are c. 1708 *CIC*/1917 and *Provida Mater* 57. The changes introduced by the current norm are the following:

a) the phrase used to express the need to reflect the causal element in the complaint (c. 1504,2°) is technically more complete at present, as can be observed by comparing the sources of the canon:

— c. 1708 *CIC*/1917: "2.° Indicate, at least in general, what juridical bases the plaintiff is using to prove what is being alleged and claimed";

— c. 1504: "2.° Indicate on what right the plaintiff bases the case and, at least in general terms, the facts and the proofs to be evinced in support of the allegations made."

The causal element of the complaint is set forth in more detail in c. 1504,[1] and the phrase "at least in general terms" is more appropriately applied to the demonstrative facts and evidence evinced by the plaintiff in the petition.[2]

b) The provision in no. 4° of the norm ("indicate the domicile or quasi-domicile of the respondent") was not in c. 1708 *CIC*/1917, but it did appear, at least implicitly, in *Provida Mater* 57, which provided that information on the domicile or quasi-domicile *of the party* be given for the tribunal to determine its competence. At the session where this addition was made to the current norm, according to the acts, the reason given was the usefulness that this information would contribute *nonnullis utile videtur ut in libello exprimatur etiam domicilium vel quasi-domicilium partis conventae.*[3]

2. The existence of the process depends on the existence of the configuring elements. These elements are what civil procedural doctrine, especially from Von Bülow, calls procedural requirements. In a strict sense, they are not the process's *raison d'être*, but requirements of justice that the judge or tribunal must examine when a party's request is presented. Therefore, they may be defined as formal prerequisites of every process, guaranteeing the parties a just resolution of their claims. Canonical procedural doctrine has assumed the concept of procedural requirements; thus, for example, Roberti uses it as a structuring element of *pars* I of his work.[4]

The procedural requirements must be contained in the petition. This is a fundamental function of the party's plea. Moreover, cc. 1504 (when providing the requirements that must be met by the petition) and 1505 (when providing when the judge can reject the petition) regulate their respective areas in light of the procedural requirements.

It has been traditionally believed that there are two types of requirements: subjective and objective. Within the subjective requirements, the following elements are enumerated: duality of parties; the parties' legal

1. Cf. J.L. ACEBAL, commentary on c. 1504, in *Salamanca Com.*
2. Cf. *Comm.* 11 (1979), p. 83.
3. Ibid.
4. Cf. F. ROBERTI, *De processibus*, I (Rome 1956), p. 102.

standing and legal capacity; power of jurisdiction and absolute competence of the judge or tribunal. The objective requirements include the duly formalized act of the claim, the *petitum* and the juridical assertion.

The importance of the procedural requirements is highlighted by the canonical legislator, who sanctions any judgment pronounced in the situations regulated by c. 1620 with the defect of irremediable nullity. Numbers 1°, 2°, 4° and 5° of that norm include each of the subjective and objective procedural requirements indicated.

The petition must contain the requirements that make it possible to constitute the procedural relationship. Therefore, the canon provides that the following be included:

a) subjective requirements: tribunal and parties (no. 1°);

b) objective and causal requirements: *petitum*, juridical assertion and factual assertions (nos. 1° and 2°);

c) formal requirements: signatures, dates, indication of domicile, etc. (nos. 3° and 4°).

This subject has a long canonical-procedural tradition, as has been manifested by the former annotation that summarized in this way the requirements of the petition: *quis, quid, coram quo iure petatur et a quo. -Recte compositus quisque libellus habeat.*[5]

3. Number 1° of the canon provides that the petition must specify "the judge before whom the case is being introduced, what is being sought and from whom it is being sought." This paragraph combines subjective requirements (judge or tribunal and defendant) with objective requirements (what is being sought).

a) First, the petition must include an express identification of the judge or tribunal from whom intervention is being requested (c. 1502). Therefore, it is insufficient to submit a document before the jurisdictional organ. If the plea does not contain the name of the ecclesiastical tribunal or judge, the petition will be rejected because juridical protection, according to the legislator of the canons, comes through a specific judge or tribunal for an equally specific *petitum*.

The individualization of the organ of justice is closely related to the thing sought and to the parties. The characteristics of what is sought, the personal status of the parties, and the domicile or quasi-domicile of these parties are the criteria used by the *CIC* for developing the norms of competence for each tribunal or group of tribunals (cc. 1405–1416).

The invocation of the tribunal is usually made with the phase "Before the ordinary ecclesiastical tribunal of the diocese N." (Art. 57 *PrM*).

5. Cf. M. LEGA-V. BARTOCCETTI, *Commentarius in iudicia ecclesiastica*, II (Rome 1950), p. 516.

Therefore, it is not a matter of specifying the name of the judge or judges who will hear the cause, because the names will not be known until the judicial vicar indicates upon which panel it devolves, following the norms established by c. 1458. Moreover, the judge is not identified as a physical person, but as the jurisdictional organ.[6]

As procedural doctrine has already made clear, it is not enough to use the phrase "Before the competent ordinary ecclesiastical Tribunal," "because there may be more than one competent judge in the same cause, and in this case the plaintiff has the right to choose."[7]

The wording of the canon, in the singular (*coram quo iudice*), prevents the specification of more than one tribunal at a time. This does not imply, however, that the plaintiff cannot submit the petition before two or more equally competent tribunals. In these cases, each copy of the petition must bear an indication of the tribunal before whom it is being submitted. In addition, according to the rules of prevention (c. 1415), the first of the tribunals lawfully citing the respondent shall be the one to judge the cause. The citation implies that the petition has been previously admitted.

Normal practice is for the petition to be delivered to the secretariat of the tribunal,[8] although in one commentary on the canon, it has been indicated that it does not matter before which ecclesiastical office it is presented, because this office will send the document to the respective tribunal.[9] In fact, this obligation does not exist in the sphere of procedure, nor is it established in the norms that regulate it. Here it seems that there is an attempt to extend the provision of c. 1737 § 2, which applies to the administrative recourse, to the ordinary contentious trial. On the other hand, it is obvious that if the location of the tribunal is not known, the information can be obtained from the parish or at the offices of the diocesan curia, etc.

b) *Quid petatur*, what is being asked, is the object of the petition, which must be clearly stated. In fact, it is not suitable to say that we are considering the object of the trial, because that is the result of the requests of the plaintiff as well as the answer or answers of the respondent, with the judge's intervention, which will determine by decree the limits of the dispute after the proceedings provided by c. 1513 are held. In any event, it is important to stress the value of the expression of the objective element in the admission of the petition.

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6. Cf. M.J. ARROBA, *Diritto processuale canonico* (Rome 1993), p. 279.
7. M. CABREROS, in *Comentarios al Código de Derecho Canónico*, III (Madrid 1964), p. 449.
8. Cf. A. STANKIEWICZ, commentary on c. 1502, in *Commento al Codice di Diritto Canonico* (Rome 1985), p. 872.
9. Cf. K. LÜDICKE, commentary on c. 1504, in *Münsterischer Kommentar zum Codex Iuris Canonici* (Essen 1989), no. 3.

The canon does not disallow more than one procedural objective. In fact, it is usually the practice—in order to legitimately obviate the limits of some time periods and for judicial economy—to set forth more than one *petita* as subsidiaries, alternatives, or simple plurality if the actions are not in conflict. This way of proceeding has the general name of cumulation of actions (c. 1493). For other questions of interest regarding this juridical-procedural institution, see commentary on cc. 1493–1495 and 1414.

The object specified in the petition must belong to matters over which the Church exercises its jurisdiction, or be related to them. Therefore, the provisions of c. 1400 et seq. must be taken into account.

Lastly, it should be recalled that the judgment that ends the process is closely linked to the object of the petition (c. 1620,8°): *ne eat iudex extra vel ultra petita partium*. In fact, the various classes into which doctrine divides its study of judgments have the *petitum* as their point of reference. Thus, if what is being sought is the declaration or acknowledgment of a juridical relationship, the judgment will be declarative—e.g.: judgments of matrimonial nullity; if the *petitum* concerns juridical constitution, the judgment will be constitutive; and, lastly, if the object of the petition is the imposition of certain behaviors, the judgment will be classified as condemnatory.

c) The third element, the identification of the respondents: against whom it is being requested (*a quo petatur*), is provided in no. 1° of the canon to be included in the petition. This requirement is part of the subjective elements that make up the process, and their presence in the plea is necessary because the contradictory form belongs to the essence of the process. On the other hand, this form is a reflection of the confrontation of opposing or contrary interests that existed before the process, in the area of material rights, which extends to this process through the petition. Consequently, this involves a potential confrontation between parties: plaintiff or petitioner in the role of the active subject, and the respondent as the passive subject. In the specific case of a petition of nullity of marriage, if the spouses act as co-plaintiffs, the passive role is played by the defender of the bond.

The specification of the respondent will be made by setting forth the given names and surnames, when it is a physical person. If it is a juridical person, its representative must be indicated. In this regard, one may wonder if indicating a *pseudonym* of the person instead of his or her given name and surnames is admissible, considering that the alias used by the respondent may go beyond the given sphere in which the subject uses it for identification. The issue has been debated and there are differing points of view in jurisprudence and civil doctrine.[10] For example, it is

10. Cf. G. STOLFI, "Pseudonimo e domanda giudiziale," in *Studi in onore di Pietro Agostino d'Avack*, IV (Milan 1976), pp. 637–650.

common, especially in religious life, to change one's name in the "world" to one assumed when taking certain orders. In these cases, the judge must state that the identification made in the petition of the passive party must preclude any uncertainty regarding who it is. The importance that the legislator places on the respondent should not be forgotten. In c. 1620,4°, it provides that an essential defect of radical nullity of the judgment is if the trial was not initiated against some respondent.

In addition to the personal identification of the respondent, the plea must contain the necessary information for the judge or tribunal to evaluate, in admitting the petition, the respondent's legal capacity or lack thereof and substitution of the respondent, because he or she is a minor or for other reasons contemplated by the legislator (cc. 1478–1479).

Although the norm does not state it expressly, the annotation indicates that the identification of the person who is making the request (*quis petit*) must also be set forth in the petition. Moreover, if there is a minor, incapacity, or it is a juridical person, the document must indicate who is representing, substituting for, or complementing the legal capacity of the plaintiff. "The representative will have to provide the title according to which he or she may sue on behalf of the person represented."[11] If the request is made through a procurator, the mandate *ad lites* must be attested to with the petition (c. 1484 § 1).

4. In a technically better manner than the *CIC*/1917, number 2° of the canon sets forth the causal element (*causa petendi*) that the petition must include. The document must indicate on what right the plaintiff bases the case and, briefly, the facts and the proofs demonstratively supporting what the plaintiff is claiming. "It is not necessary—according to *Provida Mater* 57,3°—or advisable for a long, detailed exposition of arguments ...; it is sufficient for it to appear that the petition has not been submitted rashly." The factual and juridical arguments made by the plaintiff in the petition are intended to demonstrate the *fumus boni iuris* and the fact that he or she is litigating without rashness. In short, it is a justification of the claim.[12]

a) The cause of action is the equivalent of the reason for the request, and it is always a group of facts that, related to a given juridical norm, grant the plaintiff the subjective right—or determine the legitimate interest—on which the request for protection is based. Two elements make up the *causa petendi*: a *factual element* and a *normative element*. The prevalence of one or the other in the manner in which the plaintiff must define the *causa petendi* has given rise to two opposing doctrinal positions: the theory of *substantiation* and the theory of *individualization*.

11. C. DE DIEGO-LORA, commentary on c. 1504, in *Pamplona Com*; cf. M.J. ARROBA, *Diritto processuale*..., cit., p. 278.
12. Cf. L. DEL AMO, *La demanda judicial en las causas matrimoniales* (Pamplona 1977), p. 27.

The classic formulation of substantiation "considers the cause of action as the sum of each and every one of the facts that make up the legal factual situation, on which the right of the plaintiff depends."[13] For those in favor of individualization, on the other hand, "it is enough for the plaintiff to offer any information that specifies the *juridical relationship* (the 'right', if you will) on which the plaintiff is basing his or her request, for the cause of action to be completely identified."[14] Both theories exaggerate either the factual element of the *causa petendi* or the normative element respectively.

Canonical doctrine has considered—in the context of the *CIC*/1917—whether the *CIC* has taken one position or the other. Cabreros maintained that the *CIC*/1917 adopted the theory of substantiation. "But, in general, the *theory of individualization* is not merely a simple determination of the object and subject, but also includes, in the same petition, the *generic allegation* of some reason or basis for the request, while the theory of substantiation requires a *concrete and specific declaration* of the facts on which the request is based. From this new point of view, we can no longer state that canon law is so demanding in the statement of facts that are the basis of the request."[15]

In fact, the *CIC* is not so demanding in the statement of the facts. The plaintiff does not have to recount every fact constituting the factual situation. It is enough to identify the cause of action *at least in general terms*, indicating those facts that constitute the factual situation. With respect to the juridical classification, the *CIC* does not demand a precise individualization—except for the request for matrimonial nullity, pursuant to c. 1677 § 3—because in the canonical sphere the principle *iura novit curia* applies.[16] Therefore, could it be said that the *CIC* is taking an intermediary position between the two theories?

In order to answer that question, it is necessary to stress that, despite the rapprochement between both positions tempering the radical positions of their classical statements, there is a radical difference between individualization and substantiation. The divergence arises in connection with the change of the cause of action. According to those who support individualization, there is no new *causa petendi* as long as the juridical relationship remains the same, even if the facts on which it is based change, even if the entire factual situation changes; for supporters of substantiation, on the other hand, the cause of action will be different when the factual element changes.[17]

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13. A. DE LA OLIVA-M.A. FERNÁNDEZ, *Lecciones de Derecho Procesal*, II, 3rd ed. (Barcelona 1986), p. 36.
14. Ibid., p. 35.
15. M. CABREROS, in *Comentarios al Código...*, cit., p. 451.
16. Cf. F. DELLA ROCA, *Instituciones de Derecho Procesal Canónico* (Buenos Aires 1950), p. 192.
17. Cf. A. DE LA OLIVA-M.A. FERNÁNDEZ, *Lecciones de Derecho...*, cit., p. 37.

In view of these highly important differences from a practical point of view—a change of the *causa petendi* would involve a new opportunity to request judicial protection—it seems that, in the sphere of the canonical process, the theory of individualization cannot be assumed, at least for processes declaring nullity of marriage, which allow, in some situations, the *nova causae propositio* "supported by new and serious proofs or arguments" (c. 1644 § 1). In all other situations, the *CIC* does not contain any norms authorizing specification of when the legislator of the canon believes that there is a change in the *causa petendi*.

All the foregoing stresses the importance of the *factual element* (the factual situation) as well as the *normative element* when the petition is drafted. Both elements must be connected by the plaintiff through the appropriate "line of argument or reasoning which links the right with the fact from which the action arises. The latter, however, need not necessarily be indicated."[18] This implies that it is insufficient for the plaintiff to invoke a list of interrelated juridical norms; they must be accompanied by the *factum* that corresponds to that law invoked in the petition. The judge, when examining the plea, shall recognize the *fumus boni iuris* precisely in the certain relationship between the facts set forth in the petition and the law invoked: if the relationship does not exist, the petition should be rejected.[19]

b) For the purposes of judicial economy and in a desire to make the principle of concentration possible to some extent, the canon allows the petition to indicate the evidence by which the plaintiff expects to prove the facts asserted. This norm does not mean that the petition is anticipating a period for evidence. In this regard, the plaintiff must also be governed by the principle of adducing any evidence necessary for the judge to confirm that the petition has not been submitted rashly.

Provida Mater 59 specified the way in which the petition should indicate the evidence: "If *documentary* evidence is being offered, the documents or instruments will be submitted with the petition, if possible; if it is *testimony*, the names and domiciles of the witnesses will be indicated (cf. c. 1761 § 1 *CIC*/1917), noting the city, street and number of the home; if the evidence is *suppositions*, the facts or indications from which they are deduced, at least in general terms, shall be indicated. Nevertheless, there is nothing to prevent the plaintiff from offering subsequent evidence in the course of the trial."

When the plaintiff anticipates that, due to the principle of preclusion—characteristic of the process, which takes place in parts, each of which has its own activity—any of the evidence cannot be examined at its

18. C. DE DIEGO-LORA, commentary on c. 1504, cit.
19. Cf. S. VILLEGGIANTE, "Ammisione del libello e concordanza del dubio," in *Ephemerides Iuris Canonici* 34 (1978), p. 301.

time in the proceedings, the petition is the proper means for requesting that the judge hold an advanced examination of evidence, that is, that he advance the time for admission of evidence in order to secure it. In these cases, which are admitted by the *CIC* as exceptions (c. 1520), the plaintiff must, besides specifying everything regarding the evidence he or she is asking to have examined early, adduce and prove the *grave reason*—fear of death of the witness, inspection of valuable circumstantial evidence that is about to perish, etc.—that is the basis of the request.

5. According to no. 3° of the canon, the petition will be signed by the plaintiff or by his or her procurator, will be dated and indicate the place where they live or reside for the purposes of receiving notice from the judge.

The plaintiff's signature or that of his or her procurator is necessary and manifests the authority of the petition; it is assumed as one's own. If it is signed by the procurator (c. 1482) named by the plaintiff, the procurator must have, "before beginning his function," the *mandatum ad lites*, which he will present together with the petition in order to prove his representative capacity. As an exception, if the conditions of the factual situation described in c. 1484 § 2 are met—*a)* preventing the extinction of a right, *b)* demanding the suitable guarantee, *c)* indication of a peremptory time limit for presenting the mandate, *d)* lack of force of the act if the mandate is not presented in that term—the judge may admit a procurator—that is, the representation that the procurator performs for his alleged client—even if no mandate is presented.

The date on the petition is demanded as a formal requirement, but its more important significance is the indication of the so-called suspect time in any of its limits. The date of the protocol of the petition is also relevant when it is registered by the notary at the secretariat of the tribunal (c. 1458); that date is relevant for setting the order that the cause will have, for counting the terms indicated by c. 1506, interrupting any prescription, etc.[20]

The plea must set forth the place at which the plaintiff wishes to receive documents, citations or notifications that the judge or tribunal will send during the process. Therefore, this aspect is not information for the consideration that the tribunal must give regarding its competence once it has received the petition. That is why the canon does not state in this no. 3° that the domicile or quasi-domicile of the plaintiff must be indicated, but rather refers, in general, to the place where (the plaintiff as well as the procurator) live or claim to have their residence. Obviously, neither the residence of the procurator nor the place where he lives determines competence.

20. Cf. C. DE DIEGO-LORA, commentary on c. 1504, cit.

6. Lastly, as an innovation, the canon provides that the domicile or quasi-domicile of the respondent must be indicated. Doctrine has given a double meaning to this provision. This provision seems logical, because if the plaintiff is asked to indicate where he or she wishes to receive notice, "it is even more appropriate to demand the place certain where citations must be served."[21] But, its inclusion is also extremely useful for recognizing as a possible forum that of the tribunal of the domicile or quasi-domicile of the respondent.[22]

21. Ibid.
22. Cf. M.F. POMPEDDA, "Diritto processuale nel nuovo Codice di diritto canonico. Revisione o innovazione?" in *Ephemerides Iuris Canonici* 39 (1983), p. 217.

1505 **§ 1. Iudex unicus vel tribunalis collegialis praeses, postquam viderint et rem esse suae competentiae et actori legitimam personam standi in iudicio non deesse, debent suo decreto quam primum libellum aut admittere aut reicere.**

§ 2. Libellus reici potest tantum:

1° si iudex vel tribunal incompetens sit;

2° si sine dubio constet actori legitimam deesse personam standi in iudicio;

3° si non servata sint praescripta can. 1504, nos. 1–3;

4° si certo pateat ex ipso libello petitionem quolibet carere fundamento, neque fieri posse, ut aliquod ex processu fundamentum appareat.

§ 3. Si libellus reiectus fuerit ob vitia quae emendari possunt, actor novum libellum rite confectum potest eidem iudici denuo exhibere.

§ 4. Adversus libelli reiectionem integrum semper est parti intra tempus utile decem dierum recursum rationibus suffultum interponere vel ad tribunal appellationis vel ad collegium, si libellus reiectus fuerit a praeside; quaestio autem reiectionis expeditissime definienda est.

§ 1. Once he has satisfied himself that the matter is within his competence and the plaintiff has the right to stand before the court, the sole judge, or the presiding judge of a collegiate tribunal, must as soon as possible by his decree either admit or reject the petition.

§ 2. A petition can be rejected only if:

1° the judge or the tribunal is not legally competent;

2° it is established beyond doubt that the plaintiff lacks the right to stand before the court;

3° the provisions of Can. 1504 nos.1–3 have not been observed;

4° it is certainly clear from the petition that the plea lacks any foundation, and that there is no possibility that a foundation will emerge from a process.

§ 3. If a petition has been rejected because of defects that can be corrected, the plaintiff can draw up a new petition correctly and present it again to the same judge.

§ 4. A party is always entitled, within ten canonical days, to have recourse, based upon stated reasons, against the rejection of a petition. This recourse is to be made either to the tribunal of appeal or, if the petition was rejected by the presiding judge, to the collegiate tribunal. A question of rejection is to be determined with maximum expedition.

SOURCES: § 1: c. 1709 § 1; *NSRR* 60; *PrM* 61
§ 2: *PrM* 64
§ 3: c. 1709 § 2; *PrM* 62
§ 4: c. 1709 § 3; *PrM* 66

CROSS REFERENCES: cc. 201, 221, 668 § 2, 1404–1405, 1407–1416, 1426, 1440, 1444, 1446, 1457, 1460–1461, 1465 § 1, 1467, 1488 § 2, 1501–1504, 1506, 1512,3°, 1529, 1608, 1620–1622, 1625, 1629,5°, 1641–1642, 1645, 1673, 1676, 1694, 1709

COMMENTARY

Rafael Rodríguez-Ocaña

1. Admission or rejection of the petition is no longer a collegiate act, as when it had to be handled by a tribunal of more than one judge (c. 1709 *CIC*/1917). However, even when the *CIC*/1917 was in force, there was increasing departure from the provisions of c. 1709. On the one hand, doctrine admitted that the petition could be rejected by the presiding judge of the tribunal for formal defects that were easily rectified by the party.[1] On the other hand, the difficulties in having the college of judges meet and the increase in the number of causes led to the establishment of "the contralegem custom that is now institutionally accepted."[2]

The first effect of the presentation of the petition is that it is entered in the register-book by the notary, and the date and protocol or file number for the case are assigned and recorded. The importance of that date and protocol number is expressed by c. 1458 and by doctrine.[3] Once the petition is presented, it is assigned to the respective tribunal or judge; for this purpose, the tribunal must first be constituted. The examination of the petition will be by the sole judge or the presiding judge of the collegiate tribunal, which is an exception to the principle that "a collegiate tribunal must proceed in a collegiate fashion" (c. 1426 § 1).

Does this imply that the college is prohibited from examining the petition? Several writers[4] maintain that the norm does not prevent the

1. Cf. M. CABREROS, commentary on c. 1709, in *Código de Derecho Canónico y legislación complementaria* (Madrid 1969), p. 663.
2. L.E. CUERVO, "Algunas innovaciones en el derecho procesal del Código reformado," in *Universitas Canonica* 1 (1981), p. 308.
3. Cf. L. DEL AMO, *La demanda judicial en las causas matrimoniales* (Pamplona 1977), pp. 41–43.
4. Cf. L. CHIAPPETTA, commentary on c. 1505, in *Il Codice di diritto canonico. Commento giuridico-pastorale*, II, (Naples 1988); J.L. ACEBAL, commentary on c. 1505, in *Salamanca Com.*

college of judges from examining the petition on special occasions. In these situations, recourse against a decree rejecting the petition shall be lodged before the appeals tribunal.

2. At this pre-admission phase, there is a discussion on the advisability of "serving notice" of the petition either on the defender of the bond and promoter of justice, if they must intervene in the process, or on the respondent.[5] The discretion of the judge is highly important. Therefore, one should not become lax (which would prejudice the proper administration of justice), nor overly strict, delaying the legitimate right to action of the plaintiff. A concern for avoiding any commotion that could result from acceptance of unfounded petitions, the possibility of avoiding unnecessary expenses and a reflection of the importance given the examination of the petition, have led some tribunals to hold an *inquisitio praevia* or *pre-trial-statement.*[6]

There are two intermingling issues here. On the one hand, the legislator provides that judges "at the early stages of litigation" (c. 1446), "*before* he accepts a case" (c. 1676), must make available the means necessary for the parties to seek an equitable solution to their dispute, with the judge indicating the appropriate means for reaching it, which will depend on the nature of the object of the trial. This involves an activity—"provided that it entails some hope of success"—before the admission of the petition, in which the plaintiff and respondent will have to participate.

The second issue involves the *inquisitio praevia*, the purpose of which is to accept or reject the petition. In this regard, one should note:

— the *CIC* neither orders nor prohibits it; therefore, each judge will determine whether it is necessary in a given case;

— its limits are narrow, intended to examine why the petition can be rejected or administered; therefore, the *inquisitio praevia* cannot become a process before the process;

— although evidence can be set forth before the *litis contestatio* for a grave reason (c. 1529), it is allowed for securing evidence that one fears cannot be examined at the appropriate time (see commentary on c. 1504);

— the judge must be prohibited from directly considering the merits of the case.[7]

3. In any event, the canon provides that the petition must be admitted or rejected as soon as possible. The judge has one month to give the decree of admission, counted from when the document is submitted, a

5. Cf. L. DEL AMO, *La demanda...*, cit., pp. 44–48.

6. Cf. M. WEGAN, "'Reiectio libelli' und 'ius defensionis' der klagenden Partei," in *Iustus Iudex* (Essen 1990), pp. 613–617.

7. Cf. S. VILLEGIANTE, "Ammisione del libello e concordanza del dubbio," in *Ephemerides Iuris Canonici* 34 (1978), pp. 302–303; A. STANKIEWICZ, "De libelli reiectione eiusque impugnatione in causis matrimonialibus," in *Quaderni Studio Rotale* 2 (1987), pp. 76–77.

term which can be extended for no more than ten days. Violation can give rise to disciplinary sanctions (c. 1457).[8] The combination of cc. 1505 and 1506 allows the claim that the *quam primum* of c. 1505 § 1 means one month, since once that time arrives, the party can urge the judge to fulfill his obligation (c. 1506).

4. The acceptance or rejection must be by decree. The canon has eliminated the *in fine* of c. 1709 § 1 *CIC*/1917, which provided that the decree rejecting the petition must be well-founded. Now, c. 1617 renders ineffective any judicial decrees that are not merely procedural, if they do not contain the reasons for the decision made. Obviously, the decree of c. 1505 is not a merely ordering decree, nor does it express merely procedural orders, but rather directly affects the faithful's right to juridical protection (c. 221). Therefore, the reasons must be given, especially if it is a rejection. The decree of admission, when it makes way for justice for a party, could be considered procedural.

5. Before making the decree, the judge shall proceed to the task of examination covering the various elements contained in the petition. In this regard, c. 1505 may cause some confusion. In fact, c. 1505 § 1 seems to indicate that, after verifying his competence for the cause and verifying that the plaintiff has *capacitas standi in iudicio*, the judge shall pronounce a decree admitting or rejecting the petition, leaving for a later time the consideration of the other requirements of the petition. This interpretation of the canon seems incorrect, since paragraphs 1 and 2 of the norm are interrelated. Therefore, after examining the petition in *all* its elements, the judge shall admit or reject the petition by decree; rejection may only be given for one of the reasons set forth in § 2.

If c. 1505 is compared to its parallel from the *CIC*/1917, c. 1709, it may be noted that the consultors have retained § 1 of c. 1709, which set forth the issue of competence and of *capacitas standi in iudicio*, but without a second paragraph setting forth the reasons for rejecting the petition. When c. 1505 adds these reasons, leaving § 1 almost identical to that of c. 1709 *CIC*/1917, it leads to an interpretation that is not in keeping with the *mens legislatoris*.

An examination of the petition shall consider the following elements:

a) *Competence of the judge or tribunal.* This should be the first issue that the judge confirms, pursuant to the norms regulating competence (cc. 1405, 1407–1416, 1440, 1444, 1673, 1694 and 1709). This is because, if he reasonably concludes that he is not competent, he has no reason to consider the petition and can reject it by decree.

The judge's incompetence can be absolute or relative. Absolute incompetence (c. 1404) is an essential procedural requirement for there to be a process. Its absence gives the judgment a defect of irremediable

8. Cf. L. DEL AMO, commentary on ch. 3: "De los plazos y prórrogas," in *Pamplona Com.*

nullity (c. 1620,1°). Therefore, the legislator provides that, at any phase of the process, if a judge notices his absolute incompetence, he must declare it (c. 1461). Relative incompetence (c. 1407 § 2) is not a procedural requirement in the strict sense; it is a requirement of legality, lawfulness (which concerns proper order in the distribution of causes) and guarantees proper administration of justice. A judge who hears a case with relative incompetence can end up being competent (c. 1512,3°), if the exception of relative incompetence (c. 1460) is not lodged at the proper stage of the proceedings or if the title of the *forum praeventionis* (c. 1415) is claimed.

In some regards, the legislator provides that a series of proceedings must be carried out, or that certain conditions must be met, for the judge to invoke his relative competence. This occurs, for instance, with the forum for matrimonial causes (c. 1673). For the application of the domicile of the plaintiff and of the tribunal in which most of the evidence is going to be examined to be lawful, some requirements are provided, including a hearing for the respondent. This is an example of how *in limine litis*, before even the admission of the petition, the *pars conventa* must be called for one to state before the judicial vicar of one's domicile whatever one believes relevant for him to consider before giving his consent[9] (c. 1673,3°–4°).

To stress the importance given to norms of competence, the legislator warns about punishment that can be incurred by the judge for refusing to administer justice when he is certainly competent, or for declaring himself competent when he has no juridical right legitimizing competence (c. 1457). In addition, the legislator provides disciplinary measures against advocates and procurators "who fraudulently [... are] withdrawing cases from tribunals which are competent, so that they may be judged more favorably by other tribunals" (c. 1488 § 2).

b) *The lawful person standi in iudicio of the actor.* This element also belongs to the subjective procedural requirements. What competence is to the tribunal, the *lawful persona standi in iudicio* is to the plaintiff. This aptitude of the plaintiff includes the examination of the juridical capacity (that is, the aptitude necessary to be subject to juridical rights and obligations) and the legal capacity (the aptitude for performing juridical acts effectively in *the process*). In a strict sense, those capacities are the ones that constitute a subjective procedural requirement. Should they be missing and should the petition be admitted, any judgment pronounced would be irremediably null, pursuant to c. 1620,5°.

Standing for being in a trial also implies that the judge must examine whether the plaintiff falls under any of the situations in which the legislator

9. Cf. Signatura, *Responsio per generale decretum ad propositum quaesitum de can. 1673,3° CIC*, in *AAS* 85 (1993), pp. 969–970, along with my "Breve comentario al Decreto general de la Signatura sobre el c. 1673,3°," in *Ius Canonicum* 34 (1994), pp. 641–650.

demands a requirement such as permission from one's ordinary before performing procedural acts.[10] Thus, for instance, religious need permission from their superior to perform "*any action* concerning temporal goods" (c. 668 § 2). Therefore, to sue in a trial when the object thereof is a temporal good, religious need permission. The absence of this permission would authorize the judge to reject the petition. However, should the petition be admitted, a lack of permission would not involve nullity of the judgment, unlike in cases involving a lack of capacity. The reason is that *ad processum* standing is not included in procedural requirements.[11]

c) *What is mandated by c.* 1504,1°–3°. Until the 1982 *Schema*, this subparagraph only contemplated, as a reason for rejection, failure to comply with nos. 1 and 3 of c. 1504. In the revision of the 1976 *Schema*, inclusion of the *causa petendi* was requested but not admitted: *consultoris propositio non placet, quia sapit nimia severitate.*[12] Nonetheless, the introduction of the requirement was accepted in the 1981 *Relatio.* The proposal came from Cardinal Konig: "*ad § 2 addatur 'aut si omnimodo desit aliqua indicatio, de qua in can. 1456,2°' ut ratio habeatur praescripti huius canonis 1456,2°, qui exigit ut in libello indicetur quo iure actor innititur et quibus factibus et probationibus ad evicenda ea quae asseruntur.*"[13]

The judge will reject the petition if any of the following is missing: specification of before which judge the cause is introduced, the *petitum*, against whom it is being requested, the *causa petendi* (right on which it is based, facts and evidence), signature of the plaintiff or his or her procurator, and in this case the mandate *ad lites* must be verified (c. 1484), date (day, month, and year), and indication of the place to receive court notices. Omission of the domicile or quasi-domicile of the respondent is not a reason for rejecting the petition (c. 1504, 4°).

For a correct interpretation of this part of the canon, the provisions of the same norm on other reasons for rejecting the petition must be taken into account, because it seems that the provision is repeating some of the reasons for not admitting the petition. For example, the tribunal is referred to twice, and there is a double reference to the *causa petendi.* However, what the legislator is indicating with the provision of c. 1505 § 2,3° is not the subjective and objective basis of the petition (competence of the tribunal, capacity of the plaintiff, and *fumus boni iuris*), but that the petition

10. Cf. C. DE DIEGO-LORA, commentary on c. 1505, in *Pamplona Com.*
11. Cf. CPI, Reply, January 4, 1946, in *AAS* 38 (1946), p. 162; G. RICCIARDI, "La costituzione del curatore processuale," in *Il processo matrimoniale canonico*, 2nd ed. (Vatican City 1994), p. 411.
12. *Comm.* 11 (1979), p. 84.
13. Code Commission, *Relatio complectens synthesim animadversorum ab Em.mis atque Exc.mis Patribus Commissionis ad novissimum schema Codicis Iuris Canonici exhibitarum, cum responsionibus a Secretaria et Consultoribus datis* (Typis Polyglottis Vaticanis 1981), p. 316.

must be well worded in its most important points. The proposal from Cardinal Konig made this clear by asking that the expression *aut si omnimodo desit aliqua indicatio* be added to the canon.

In light of this interpretation, two situations will arise in practice: a lack of any or all of the requirements of c. 1504,1°–3°, or erroneous wording of these requirements by the plaintiff.

Concerning the first case, not all requirements have the same importance. Therefore, for example, the judge should not equally assess the lack of a *causa petendi* and the omission of the place to receive notice from the tribunal. If a petition does not meet any requirement, it must be rejected outright. Likewise, it will be rejected when the petition does not indicate any of the requirements that are more important in connection with the constitution of the process.

With respect to an error or incorrect wording of the requirements, it devolves upon the judge to consider rejecting the petition, even if it is possible to correct them and present a new corrected petition (c. 1505 § 3), or, on the other hand, proceed to admit it, despite its errors, because they are insignificant.

This is a practical issue, in which the jurisprudence of the Roman Rota (Art. 126 *PB*) can be an indispensable point of reference for the lower courts, for the purpose of establishing more specific criteria for applying the provisions of c. 1505 § 2,2°.

d) *Foundation of the petition.* This was not included in c. 1709 *CIC*/1917, but it was understood in *Provida Mater* 64, being extended by doctrine in a general formulation to all types of causes.[14] In this case, the judge will reject the petition when, from an examination of the petition, the judge is certain that it lacks a foundation and that one cannot be expected to appear during the process.

According to the terms used by the canon, this requirement has the following characteristics:

1) *Ex ipso libello:* the source that the judge has for reaching certainty of the lack of the well-founded right is *the petition*, especially the part dedicated to the *causa petendi:* the law adduced, the facts recounted, at least generally, the arguments linking the facts to the law, which reveal the action even if only in appearance, and the evidence by which the plaintiff expects to prove that his or her request is not rash or unfounded.

2) *Si certo pateat:* the legislator requires *certainty* in the mind of the judge that the petition lacks the well-founded right and that there is no expectation that it will appear during the process. There is a similarity between the nature and characteristics of this certainty and that described in c. 1608. This latter canon requires moral certainty, not physical or

14. Cf. C. DE DIEGO-LORA, commentary on c. 1505, cit.; M. CABREROS, in *Comentarios al Código de Derecho Canónico* (Madrid 1964), p. 462.

metaphysical certainty, or a probability or subjective conviction.[15] In short, from an examination of the petition, one would find indications and signs that, as a whole, establish in the mind of the judge a true certainty that would prevent reasonable doubt for a man of sound mind.[16]

3) *Carere fundamento, neque fieri posse, ut aliquod ex processu fundamentum appareat*: the certainty required in the mind of the judge must decide that the request lacks the *fumus boni iuris* and that this lack will persist, even if the process takes place.

The latest jurisprudence of the Rota circumscribes the lack of indications of well-founded law within narrow limits. For this purpose, it is enough to observe the terms used by jurisprudence: rejection of petitions is allowed when the petitions "*crassa scateant falsitate, vel contradictoria asserant, vel evidenter destituantur fundamento in re.*"[17]

6. When the petition is rejected due to remediable defects, the plaintiff may submit a new, properly drafted petition (c. 1505 § 3). This norm leads one to believe that there are two types of rejection—absolute and incidental—with different scopes and causes.

Absolute rejection implies that the plaintiff does not have the right to the protection afforded by the process because the essential requirements have not been met in the petition, which cannot be corrected, because they do not exist. The other type of rejection is set forth in § 3 and may be called *incidental*. It implies that the petition does not lack the *fumus boni iuris* and it does contain the requirements for constitution of the process. The petition is not, in these cases, entirely inappropriate. Its defects concern incidental issues "if the petition is obscure in its wording, confused in the statement, uncertain in the claims, imprecise in the request or in the cause of action, deficient in the foundations, lacking precise formalities, such as when the place, the tribunal to whom it is directed, the date, or the signatures is omitted."[18] In these situations, the judge must reject the petition, but it should be made clear in the decree that the plaintiff is urged to correct the defects and resubmit the request. The judge will reexamine the new document.

7. Lastly, § 4 of the canon regulates recourse against rejection of the petition. There are obvious differences between the current norm and its precedent, c. 1709 § 3 *CIC*/1917.

The term for lodging the recourse is ten canonical days from when one becomes aware of the decree rejecting the petition. It is a *legal* term, fixed and peremptory; therefore, once the period expires, the right expires

15. Cf. C DE DIEGO-LORA, commentary on c. 1608, in *Pamplona Com.*
16. Cf. PIUS XII, Alloc. to the Tribunal of the Rota Romana, October 1, 1942, AAS 34 (1942), pp. 338–342.
17. P. MONETA, *La giustizia nella Chiesa* (Bologna 1993), p. 97, note 26.
18. L. DEL AMO, *La demanda judicial...*, cit., p. 65.

and its preclusion is absolute (c. 1465 § 1). However, its calculation can be interrupted; it is counted by days, not counting any days on which there is an impediment (cc. 201 and 1467).

The competent tribunal for hearing the recourse is the collegiate tribunal, if the petition was rejected by the presiding judge, or the appeals tribunal, if the decree was pronounced by the sole judge. In the previous code, the competent tribunal was always the higher tribunal. For writers who allow examination of the petition by the college of judges (see no. 1 of this commentary), recourse will be submitted before the appeals tribunal.

The rejection issue must be resolved *expeditissime*. The *CIC*/1917 and *Provida Mater* 66 added that the tribunal, before deciding, would hear the party and the promoter of justice or the defender of the bond. This requirement has disappeared from the current canon at the request of the consultors.[19] Now, the recourse proceeding takes place without any hearing of the public or private parties, and any resolution adopted is unappealable (c. 1629,5°).

There is an argument that maintains no appeal is allowed against the decision of the appeals tribunal upholding the rejection of the petition. However, the argument holds that it is possible to appeal to the appeals tribunal a decision of the college confirming the decree of rejection by the presiding judge. Some reasons suggested by the writers and jurisprudence supporting this interpretation are that the college that considers the presiding judge's decree does so at the first instance, and the *expeditissime* of c. 1505 § 4 refers to the appeals tribunal, not to the college.[20] A decree of the Rota has come out against these opinions.[21]

Provida Mater 66 specified that if the petition was admitted, "the cause would be transferred to the tribunal *a quo* for resolution." It was not necessary to include this clarification in the current canon, because the appeals tribunal must only hear the recourse against a decree rejecting the petition, not the cause itself.[22]

Although the canon does not specify the plaintiff's remedies against an unappealable decree rejecting the petition, doctrine and jurisprudence have tried to justify the feasibility of the plaint of nullity and of *restitutio in integrum* in these cases.

With respect to the lodging of the plaint of nullity before the judge who pronounced the decree (c. 1621), which can be joined to the appeal (c. 1625), doctrine is silent in its admission.[23] There can be several reasons supporting the plaint: lack of the *actus humanus deliberatus circa rem*

19. Cf. Comm. 11 (1979), p. 85.
20. Cf. A. STANKIEWICZ, "De libelli reiectione..." cit., pp. 79–81; S. VILLEGGIANTE, "Le questioni incidentali," in *Il processo matrimoniale...*, cit., pp. 640–642.
21. Cf. *coram* PINTO, decr. May 23, 1987, in *Quaderni Studio Rotale* 2 (1987), pp. 107ff.
22. Cf. *Comm.* 11 (1979), p. 85.
23. Cf. L. MATTIOLI, "La fase introduttoria del processo e la non comparsa della parte convenuta," in *Il processo matrimoniale...*, cit., p. 486.

vel admittendam vel reiciendam[24]; defect in the judicial petition or in the procedural requirements; defect in the motives or reasons for the decree (c. 1622,2°).[25] The plaint of nullity may be perpetually submitted as an exception, and as an action within a term of ten years from the date of the decree (c. 1621).

Concerning *restitutio in integrum* against the unappealable decree rejecting the petition, doctrine and jurisprudence are divided regarding its admission.[26] The issue has arisen particularly with respect to petitions for matrimonial nullity. Those who maintain that the special remedy of *restitutio in integrum* is possible against an unappealable decree upholding rejection of the petition justify their position—in order to obviate the provision of c. 1645—indicating that said decree "avendo l'effetto pratico di impedire il processo ed essendo inappellabile, costituisce una indubbia 'res iudicata' alla quale, se manifestamente ingiusta ai sensi del can. 1645, non può porsi remedio altrimenti che con la '*restitutio in integrum.*'"[27] Those who maintain that *restitio in integrum* is not admissible claim that the decree confirming rejection of the petition cannot become an adjudged matter; were it so, upon the presentation of a new introductory petition—*ex eodem petito eademque causa petendi merito ac iure*—the adjudged matter exception could even be lodged ex officio, pursuant to c. 1642.[28] This reasoning would lead to the absurdity of making the material effect of the adjudged matter fall on the petition, with the petition constituted lawfully between the parties (c. 1642 § 2).

There is an underlying distinct concept of the adjudged matter and of the role played by the petition introducing the cause. On the one hand, the idea that the adjudged matter arises when the decree is already unappealable and, even more so, when it is claimed that the adjudged matter can occur outside of the process and on the petition seems reductive. The "force of a definitive judgment" implies that the issue is definitively closed. It is characteristic of decrees and interlocutory judgments that extinguish the process once initiated, but that do not resolve the case in chief. This main issue may be presented again because it has not achieved the adjudged matter effect. The *res iudicata* is, on the other hand, the definitive judgment on the action. Therefore, it needs a judicial process, it occurs with judgments, it is formally unappealable, and it becomes law for the parties. From whichever point of view it is considered, these characteristics are not present in the decree upholding the rejection of the petition. Therefore, it seems reasonable to take the position that maintains the

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24. *Coram* LEFEBVRE, decr. October 21, 1976, in S. VILLEGGIANTE, "Ammisione del libello...," cit., p. 313.
25. Cf. A. STANKIEWICZ, "De libelli reiectione...," cit., p. 81.
26. Cf. L. MATTIOLI, "La fase introduttoria...," cit., pp. 486–487; A. STANKIEWICZ, "De libelli reiectione...," cit., pp. 81–84.
27. L. MATTIOLI, "La fase introduttoria...," cit., pp. 486–487.
28. Cf. A. STANKIEWICZ, "De libelli reiectione...," cit., pp. 83–84.

inadmissibility of the extraordinary recourse of *restitutio in integrum* against these decrees. If what is being sought is a remedy against these unappealable decrees, it can be found in the repetition of the petition with its defect duly corrected, which can be done as many times as it is rejected, because it is evident that in no case are we in the presence of the *res iudicata* effect.

1506 **Si iudex intra mensem ab exhibito libello decretum non ediderit, quo libellum admittit vel reicit ad normam can. 1505, pars, cuius interest, instare potest ut iudex suo munere fungatur; quod si nihilominus iudex sileat, inutiliter lapsis decem diebus a facta instantia, libellus pro admisso habeatur.**

If within one month of the presentation of a petition, the judge has not issued a decree admitting or rejecting it in accordance with Can. 1505, the interested party can insist that the judge perform his duty. If, notwithstanding this, the judge does not respond, then after ten days from the party's request the petition is to be taken as having been admitted.

SOURCES: c. 1710; *PrM* 67

CROSS REFERENCES: cc. 17, 57, 123, 201–202, 1145 § 1, 1281 § 2, 1389 § 2, 1457, 1503, 1505, 1507 § 2, 1589, 1670, 1677, 1691, 1693, 1710, 1728

COMMENTARY

Rafael Rodríguez-Ocaña

1. The canon resolves the problem caused by negligence on the part of the judge when it is time to accept or reject the petition, as provided in c. 1505.

Under c. 1710 *CIC*/1917 and *Provida Mater* 67, the interested party could insist that the judge perform his duty if he had not issued a decree of admission or rejection within one month after the petition was submitted. If the judge remained silent, the party could lodge recourse before the local ordinary or the higher court, to force the judge to decide the cause or be replaced by another judge.

The doctrinal problems[1] and practical ineffectiveness[2] of c. 1710 *CIC*/1917 have brought about a change in the provision, namely the *ipso iure* admission of the petition. Under the new canon, if, within one month of the presentation of a petition, the judge has not issued a decree admitting or rejecting it, the interested party can insist that the judge perform

1. Cf. M. LEGA-V. BARTOCCETTI, *Commentarius in iudicia ecclesiastica*, II (Rome 1950), pp. 521–524; J.L. ACEBAL, commentary on c. 1506, in *Salamanca Com.*

2. Cf. J.J. GARCÍA FÁILDE, *Nuevo Derecho procesal canónico* (Salamanca 1984), p. 43.

his duty. If the judge does not respond, then the petition is considered admitted after ten days from the party's request.

During the drafting of the canon, several amendments to the 1976 *Schema* were introduced. First, the term of five days that the *Schema* granted the judge for answering, after the instance was presented, was increased to ten days. Second, no sanction against the judge was admitted for not complying with his obligation. Third, the possibility of shortening or lengthening the terms established by the norm through particular law was eliminated. Finally, the consultors maintained that admission *ipso iure* of the petition must be retained "*sive quia iura partis ita salvantur, sive quia generatim reiectio libelli rarissime fit et ideo admissio ex iure non est incongrua.*"[3]

2. Some authors have pointed out that the new norm has resulted in practical problems shifting to areas other than those raised by c. 1710 *CIC*/1917. Canon 1506 was described as a "norm to *streamline* the process,"[4] or as a "novità curiosa" that gives administrative silence a juridical effect of considerable scope—admission of the petition—seeking speed in the procedure.[5] It is stressed that the norm can seem severe, but appropriate, and the reasons cited by the consultors are generally admitted: safeguarding the rights of the parties and the coherence of the automatic admission, given that rejection of the petition is rare[6]; on occasions the name "tacit acceptance of the petition" is given to it according to the rule *qui tacet, consentire videtur*[7]; and, lastly, that the norm does not reflect the reality of many tribunals that, with limited resources, hear large numbers of matrimonial causes.[8]

3. The terms provided by the canon—one month and ten days respectively—must be calculated according to the rules of continuous time (the month) and canonical time (the ten days). Consequently, the term of one month does not allow any interruption (c. 201 § 1); it is always measured according to the calendar (c. 202 § 2). The ten days, on the other hand, are counted without taking into account days that are not canonical (c. 201 § 2).

Both terms are legal terms—according to those who impose them—non-prorogable—according to their stability—and must fit within improper terms. The terms "are those established by law within which the

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3. *Comm.* 11 (1979), pp. 87–88.

4. J.J. GARCÍA FAÍLDE, *Nuevo Derecho procesal...*, cit., p. 43.

5. Cf. J. OCHOA, Il *'De Processibus' secondo il nuovo Codice, in La nuova legislazione canonica* (Rome 1983), p. 374.

6. Cf. J.L. ACEBAL, commentary on c. 1506, cit., L. CHIAPPETTA, commentary on c. 1506, in *Il Codice di diritto canonico*, II, (Naples 1988), p. 623.

7. Cf. A. STANKIEWICZ, commentary on c. 1506, in *Commento al Codice di Diritto Canonico* (Rome 1985), p. 875.

8. Cf. G. SHEEHY, "Introducing a case of nullity of marriage," in *Dilexit iustitiam* (Vatican City 1984), pp. 343–344.

tribunal must perform all that is to be done."[9] Therefore, they do not have any peremptory effect, because the interested party may insist once a month has passed, without the canon indicating any limit, and the judge, whether or not he is being urged, has one month plus ten days (which can be more if they include a non-canonical day) to issue the decree of admission or rejection.

The term of one month (see commentary on c. 1505) is counted from when the petition was submitted to the secretariat of the tribunal and a protocol number or date of entry or submission was assigned to it. Once the month lapses, the interested party may insist that the judge perform his duty. The canon does not establish a term for insisting; therefore, the interested party has an *indefinite* time to remind the judge that he must *decide on the petition.*

If the request was made orally (c. 1503 § 1), the date to begin calculating the month will be when the act was drawn up by the notary, which, once approved by the plaintiff, takes the place of the plaintiff's petition (c. 1503 § 2).

4. Compared to the provisions of c. 57 on the juridical effects of administrative silence, the legislator has used different criteria in c. 1506. For example, while c. 57 provides a term of three months for answering the petition or issuing a decree, c. 1506 indicates the terms mentioned above. However, the most notable difference is that, in c. 57 § 2, administrative silence is considered a negative pronouncement, and in c. 1506, the *judge's silence implies a tacit positive response.*

5. The conditions established by c. 1506 are, on the part of the judge or the presiding judge of the tribunal, that he has not issued the decree of admission or rejection pursuant to c. 1505 and, after the instance, he has remained silent. The canon also uses another expression, which in principle is equivalent to the foregoing: "that the judge perform his duty." What do these expressions mean?

First, interpreting the canon according to the proper meaning of the words (c. 17), for the interested party to insist that the judge perform his duty, the canon requires that the judge cannot have issued a decree of admission or rejection in one month. Therefore, the reasons maintained by the judge when receiving the petition are irrelevant. The legislator is assessing the delay[10] in pronouncing the decree, regardless of whether the judge is proceeding with the preliminary investigation or other proceedings. In short, if the decree of admission or rejection has not been issued once a month has passed, the interested party may insist that the judge do so.

9. L. DEL AMO, commentary on ch. 3: "De los plazos y prórrogas," in *Pamplona Com.*

10. Cf. M. CABREROS, in *Comentarios al Código de Derecho Canónico* (Madrid 1964), p. 470.

Once the party has insisted that the judge perform his duty, the attitude that the *CIC* assesses is the judge's silence. If the judge remains silent despite the request, once ten days have passed, the petition will be deemed admitted. However, one might wonder if the legislator allows any response to the insistence other than a decree of admission or rejection, which would prevent the admission *ipso iure*. Within the context of the *CIC*/1917, it was understood that "*iudex autem silere intelligitur tum si nihil respondeat aut nihil deliberet sed rationes reddat mere dilatorias.*"[11] However, the next line added a clarification: "*quare si iudex respondeat se de facto inquirere ut decernat utrum libellus admittendus aut reiiciendus sit, non silet.*"[12] Consequently, the petition would not be admitted *ipso iure*. The same writer concludes this interpretation with an exception, "*excepto casu quo dilatio adeo protahatur ut libellus, reapse respui censetur.*"[13]

On other occasions, the *CIC* uses the verb *sileo* and the term *silentium* applied to two cases: to statutes, regulations, etc., and to persons. When the *CIC* indicates that the statutes or regulations are silent regarding some matter (cc. 123, 1281 § 2), it is always understood that the statutes or regulations make no provision in that respect. When the word is applied to persons not vested with authority in the Church, as in c. 1145 § 1, the silence includes behaviors such as refusing to answer, requesting new unnecessary terms,[14] etc. It is a different case with the person who is vested with authority if the law provides that he must issue a decree, or the interested party requests it through a lawful petition (c. 57 § 1). In these situations, the authority's silence is equivalent to *not issuing the decree* (c. 57 § 2).

The judge is vested with authority, and the law provides that, after an examination of the petition, he must admit or reject it by decree (c. 1505 § 1). Once the terms of c. 1506 have lapsed, and the demand is presented according to the norm, if the judge does not pronounce a decree pursuant to c. 1505, the petition is deemed admitted. Any other attitudes or reasons must not be taken into account due to the clarity of the norm. This avoids any doubt regarding the disparity of criteria and the uncertainty that it would entail for the interested party if any other answer by the judge were assessed, in knowing when the petition is admitted *ipso iure*.

6. The demand is made before the same judge before whom the petition had been submitted. It will normally be in writing, although, should there be an impediment, an oral demand may be admitted (c. 1503 § 1). In that case, the notary should draft the act of it and fulfill the other requirements pursuant to c. 1503 § 2.

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11. M. LEGA–V. BARTOCCETTI, *Commentarius in iudicia...*, cit., p. 522.
12. Ibid.
13. Ibid.
14. Cf. J. HERVADA, commentary on c. 1145, in *Pamplona Com.*

The demand must set forth the date the petition was submitted, to clearly show the passing of the period established in the canon. Additionally, the notary shall set forth in the record the day the petition is submitted, as well as the day the demand is made. These dates are essential to determining *ipso iure* admission of the petition.

Who can insist that the judge perform his duty? The canon identifies the person making the demand as "the interested party," retaining the phrase used in c. 1710 *CIC*/1917. Doctrine has maintained that the "the interested party" is obviously the plaintiff, but it could also be "the promoter of justice or the defender of the bond, if they have been heard, because inasmuch as it is a matter of administering justice and observing procedural law, the public good has an interest."[15] Some writers have extended the list of possibilities to include the respondent.[16] However, others do not admit either the respondent or other third parties, because they lack "the legal interest to intervene in a process that has not yet been initiated."[17]

7. The canon still poses some problems:

a) Because of the systematic position of c. 1506 and the references made to the norms of the ordinary contentious process in different processes (cc. 1670, 1691, 1693, 1710 and 1728), the *ipso iure* admission would apply to all kinds of processes. However, Villeggiante maintained in 1978 that the *ipso iure* admission planned by the 1976 *Schema* could not be applied to matrimonial causes. In subsequent works, he maintained the same position.[18] For Villeggiante, it seems that c. 1677 speaks of *acceptance* of the petition, which is different from the mere admission of c. 1506, since acceptance implies a *human act*, a decree by the judge.[19]

The issue is open for clarification, which should include any opinion held by jurisprudence. It will be necessary to consider which special norms are for causes on the status of persons (c. 1691), which procedural norms of the ordinary contentious process do not apply to matrimonial processes because "the nature of the matter prevents it" (c. 1691) and, if the expression of c. 1677 § 1 ("when the petition has been accepted") is a special provision for matrimonial causes in connection with the admission of the petition or a statement that once the admission procedure is complete—without regulating it in detail because of the reference to c. 1691—it is time to proceed to the citation and determination of the formulation of the doubts.

15. L. DEL AMO, *La demanda judicial en las causas matrimoniales* (Pamplona 1977), p. 124.
16. Cf. F. DELLA ROCCA, *Instituciones de Derecho procesal canónico* (Buenos Aires 1950), p. 194.
17. M. CABREROS, in *Comentarios al Código*..., cit., p. 470.
18. M. CABREROS, in *Comentarios al Código*..., cit., p. 470.
19. Cf. ibid.; L. MATTIOLI, "La fase introduttoria del processo e la non comparsa della parte convenuta," in *Il processo matrimoniale canonico*, 2nd ed. (Vatican City 1994), p. 482.

Regarding the scope of application of the automatic admission, one may refer to the remark made, in the context of the *CIC*/1917, that "this remedy of insistence against the tardiness of the tribunal can be used not only in the case of the request made, but also throughout the process, provided that the parties insist with similar documents to the requests and there is a tardy judge who is not giving any answer to the petition"[20] (cf. c. 1589).

b) Another practical problem posed by c. 1506 is how to deem the petition automatically admitted if it is lacking any of its essential elements. Is c. 1506 a remedying norm? It seems not.

Once the *ipso iure* effect of the canon takes place, what if the negligent judge is still tardy in proceeding to the acts that follow the admission of the petition? Canon 1507 § 2 does not seem to eliminate, with respect to the citation of the other parties, the problems of silence or inactivity of the tardy judge.[21] The solution is to proceed by a complaint to the competent authority with power over the tribunal that should hear the case. Canon 1457 considers serious negligence on the part of the judge causing harm to the parties to be a situation that can give rise to sanctions with suitable penalties. It is also possible to proceed through penal means against the judge when his negligent attitude is included in the legal description of the crime of c. 1389 § 2.

This solution is feasible for the plaintiff, but not for the respondent who is unaware because of the judge's tardiness of the existence of a petition against him or her; a petition which could be devoid of any foundation but nevertheless admitted *ipso iure*. Any exceptions filed by the *pars conventa* and the possibility of having recourse through a complaint will arise only when one has knowledge of the petition.

20. L. DEL AMO, *La demanda judicial...*, cit., p. 124.
21. Cf. C. DE DIEGO-LORA, commentary on c. 1506, in *Pamplona Com.*

CAPUT II
De citatione et denuntiatione actorum iudicialium

CHAPTER II
The Summons and the Intimation of Judicial Acts

1507 **§ 1. In decreto, quo actoris libellus admittitur, debet iudex vel praeses ceteras partes in iudicium vocare seu citare ad litem contestandam, statuens utrum eae scripto respondere debeant an coram ipso se sistere ad dubia concordanda. Quod si ex scriptis responsionibus perspiciat necessitatem partes convocandi, id potest novo decreto statuere.**

§ 2. Si libellus pro admisso habetur ad normam can. 1506, decretum citationis in iudicium fieri debet intra viginti dies a facta instantia, de qua in eo canone.

§ 3. Quod si partes litigantes de facto coram iudice se sistant ad causam agendam, opus non est citatione, sed actuarius significet in actis partes iudicio adfuisse.

§ 1. In the decree by which a plaintiff's petition is admitted, the judge or the presiding judge must call or summon the other parties to court to effect the joinder of the issue; he must prescribe whether, in order to agree the point at issue, they are to reply in writing or to appear before him. If, from their written replies, he perceives the need to convene the parties, he can determine this by a new decree.

§ 2. If a petition is deemed admitted in accordance with the provisions of Can. 1506, the decree of summons to the trial must be issued within twenty days of the request of which that canon speaks.

§ 3. If the litigants in fact present themselves before the judge to pursue the case, there is no need for a summons; the notary, however, is to record in the acts that the parties were present in court.

SOURCES: § 1: c. 1711 § 1; *NSRR* 65; *PrM* 74 § 1, 75
§ 3: c. 1711 § 2; *PrM* 74 § 2

CROSS REFERENCES: cc. 1389 § 2, 1457, 1506, 1513 § 2

COMMENTARY

Santiago Panizo Orallo

This canon sets forth the various ways of calling the respondent and other parties participating in the cause to court. The normal way is through the summons.

1. What is a judicial summons? The etymology of the word reflects two complementary orientations: the word "citation" implies the idea of moving, inciting or calling. In this sense, "citing" is advising and locating someone, determining a day, time, and place for handling a matter. On the other hand, "to cite" also involves the idea of rapidity, "pressure and urgency in the call: it is stimulating a person with force for the purpose of having him or her appear at a given place with a given objective (thus, in bullfighting language, one speaks of "citing the bull," of stimulating it to go to a certain corner of the bullring).

Uniting both meanings, the summons connotes the idea of calling a person with pressure and urgency to be located at a place with a given objective, usually to resolve a matter or handle some business.

In the generic procedural sense, a summons is any call from the tribunal, within the judicial order, to a person to appear at the trial on a given day and time, for any procedural activity: hearing an order, witnessing an act, giving a statement, establishing evidence, etc. Thus, the respondent, the witnesses, the experts, the lawyer, etc. are summoned. In a stricter procedural sense, the summons is the first call to court made by the judge to the respondent in order that he or she may learn of the petition, answer it if desired, and determine his or her own legal status in the process. This latter sense is what is meant by the word "to summon" in the canonical system.

2. As indicated in c. 1507 § 1, the admission of the petition by the judge must be done through a decree in which, besides admitting the petition, the litigants must be summoned to answer the petition. This can be done by answering in writing or appearing before the judge to establish the doubts. This dual option corresponds to the dual procedural option provided in c. 1513 § 2 for establishing the answer to the petition, which must be determined in the decree of admission of the petition and summons for the parties. If the answer is ordered in writing, the judge can still order the appearance of the parties, if he deems it necessary.

When the petition is admitted pursuant to c. 1506, the decree of summons must be issued within twenty days of the party's insistence on the judge's pronouncement. If, the judge continues to be negligent, the party will have the option of proceeding against the judge through a complaint (c. 1457) or criminal process (c. 1389 § 2).

3. It seems clear that the summons makes the respondent able to know the claim filed against him or her by the plaintiff. In this sense, the right to be summoned is a requirement of natural law closely linked to the right to defense, which is from natural law because of the principle that no one can be convicted or prejudiced without having first been heard and granted sufficient lawful opportunity for juridical protection.

However, since natural law favors the possibility of a defense and not the actual defense itself, when the litigants spontaneously appear before the judge, the summons is unnecessary. However, in these cases, the clerk must show on the record that the parties were present (cf. c. 1507 § 3).

4. All acts of the judge in the process are procedural acts, but they are not all jurisdictional acts. The summons is undoubtedly a procedural act, but it is also a jurisdictional act, since it contains an order from the judge. The summons always involves an order to appear, even if it is not pursued with penalties for failure to appear. In any event, allowing a failure to appear to benefit the party who has caused it should be avoided. In fact, based on the assessment of negative evidence, the judge may even infer, albeit cautiously, some evidentiary conclusions from a failure to appear. For this purpose, any circumstances supporting this deduction must be noted.

1508 **§ 1. Decretum citationis in iudicium debet statim parti conventae notificari, et simul ceteris, qui comparere debent, notum fieri.**

§ 2. Citationi libellus litis introductorius adiungatur, nisi iudex propter graves causas censeat libellum significandum non esse parti, antequam haec deposuerit in iudicio.

§ 3. Si lis moveatur adversus eum qui non habet liberum exercitium suorum iurium, vel liberam administrationem rerum de quibus disceptatur, citatio denuntianda est, prout casus ferat, tutori, curatori, procuratori speciali, seu ei qui ipsius nomine iudicium suscipere tenetur ad normam iuris.

§ 1. The decree of summons to the trial must be notified at once to the respondent, and at the same time to any others who are obliged to appear.

§ 2. The petition introducing the suit is to be attached to the summons, unless for grave reasons the judge considers that the petition is not to be communicated to the other party before he or she gives evidence.

§ 3. If a suit is brought against a person who does not have the free exercise of his or her rights, or the free administration of the matters in dispute, the summons is to be notified to, as the case may be, the guardian, the curator, the special procurator, or the one who according to law is obliged to undertake legal proceedings in the name of such a person.

SOURCES: § 1: c. 1712 § 1; *NSRR* 65, 67; *SNAS* 37
§ 2: c. 1712 § 1
§ 3: c. 1713; *PrM* 77; CodCom Resp. II, 25 ian. 1943 (*AAS* 35 [1943] 58)

CROSS REFERENCES: cc. 1478 § 1, 1480 § 1, 1677 § 1

COMMENTARY

Santiago Panizo Orallo

The decree of summons, issued by the judge, must be immediately notified to the respondent and anyone else who must appear (plaintiff, defender of the bond, promoter of justice, etc.). The petition must be attached to the decree of summons, unless, for grave reasons, the judge

considers that the petition is not to be communicated to the party before he or she gives evidence (c. *1508* § *2*).

Consequently, as a general rule, a copy of the petition must be attached to the decree of summons, for obvious reasons: the respondent must know what he or she is being accused of or what is being requested against him or her to set in motion defense options, and that constitutes a true juridical -procedural guarantee for the respondent.

There can be occasions when the judge, for grave reasons, believes that the petition should not be communicated to the party before the party gives evidence. This option must be considered an exception, because it interferes with the *ius defensionis*. The justification for this exceptional conduct lies in the existence of "grave reasons," which must be assessed by the judge and stated to the respondent when notifying him or her of the summons decree. Matrimonial causes are not excluded from these provisions, pursuant to c. 1677 § 1.

Provida Mater 113 § 1 provided that each party must be read the petition when he or she makes a judicial declaration. This presumed that, with the summons decree, they had not been informed of the petition. This provision, related to matrimonial causes, differed from c. 1722 of the *CIC*/1917, under which the respondent learned of the petition with the summons, because the summons was given in the same petition or in a document attached to it. The Apostolic Signatura, in its decision of April 6, 1971,[1] reaffirmed that, in matrimonial causes, the respondent does not have the right to learn of the petition when he or she receives the summons or at the time of the joinder of issue, and this does not imply deprivation of the *ius defensionis*.

Beginning with the new *CIC*, the need to notify the respondent of the petition together with the summons decree was spread to include matrimonial causes, unless there were grave reasons that imposed on the judge a real need to not make it known until the declaration was made at trial.

Paragraph 3 of c. 1508 provided that, if a suit is brought against a person who does not have the free exercise of his or her rights or the free administration of the matters in dispute, the summons is to be notified to the guardian, curator, special procurator, or other who, according to law, is obliged to undertake legal proceedings in the name of the person. There is no mention of parents or the representatives of juridical persons, but the enumeration in c. 1508 § 3 is not exhaustive. Therefore, parents (with regard to minors) and legitimate representatives of juridical persons must be, when applicable, the recipients of the summons in the cases contemplated in § 3 of c. 1508.

1. Cf. X. OCHOA, *Leges Ecclesiae* (Rome 1974), cols. 5987–5989.

1509 **§ 1. Citationum, decretorum, sententiarum aliorumque iudicialium actorum notificatio facienda est per publicos tabellarios vel alio modo qui tutissimus sit, servatis normis lege particulari statutis.**

§ 2. De facto notificationis et de eius modo constare debet in actis.

§ 1. With due regard to the norms laid down by particular law, the notification of summonses, decrees, judgements and other judicial acts is to be done by means of the public postal service, or by some other particularly secure means.

§ 2. The fact and the manner of notification must be shown in the acts.

SOURCES: § 1: cc. 1717, 1719, 1720, 1877; *PrM* 79, 80, 204; *SNAS* 27
§ 2: c. 1722; *NSRR* 67; *PrM* 81; *SNAS* 27 § 2

CROSS-REFERENCES: c. 1615

COMMENTARY

Santiago Panizo Orallo

This canon establishes the ordinary means of summoning the respondent and any other persons who must be summoned. It establishes the postal service as the ordinary means, while allowing for, "with regard to the norms laid down by particular law ... other particularly safe means."

If a person is summoned by mail, certified mail with a return receipt should be used, since it allows verification that the message was given either to the interested party or to someone who can give it to the interested party.

Other two methods for summoning a person include by edict and by court messenger. The summons by edict includes several possibilities. For example, the edict can be published on the court bulletin board alone, in which case its efficacy is practically null. Alternatively, the edit may be published in newspapers or in other communication media, in which case the possibilities for efficacy increase. Therefore, in some cases, summons by edict can be considered a "particularly secure" means. In fact, the commission studying the preparatory *schemata* for the *CIC* believed that this method could be included among the means considered by particular law as "particularly secure."[2]

2. Cf. *Comm.* 15 (1984), p. 63.

With respect to summons by court messenger, the new canonical legislation makes no express mention of said method, as in c. 1591 § 1 *CIC*/1917. However, this does not mean that it now cannot be used. Summons by messenger occasionally can be a very secure means of notification, so it is possible to appoint messengers to serve judicial summonses. These messengers must have the authority of notaries public, and fully attest to their proceedings, which will be set forth on the court record. The messenger, even if he is performing the function of the notary, does not exercise any *actual jurisdiction, because it is a merely the power to execute a* judge's order. For this reason, this function may be performed by laypersons, under the authority of and subordinate to the judge.

It is also possible that it could be considered legitimate custom for summons to be served by the notary of the tribunal, especially when the summons is served on the party through the procurator. On occasion, witnesses or experts appointed by the parties are called to trial by the parties' procurators, and this method appears quite secure. In some tribunals, a person who is duly authorized by the College of Procurators may receive summons from the messenger or the notary and leave them on the desks of the respective procurators.

Regardless of the form of the summons, there should always be certification on the record of the act of notification, the manner in which it was performed, the circumstances under which it took place, and the outcome. In the case of summons by mail, the return receipt should be attached to the court file.

Since the declaration of contumacy has been deleted from the *CIC*, for a declaration of absence from the process, verification that the respondent has received the judicial notification is needed. Therefore, the summons must be repeated until this verification occurs. The summons must be considered peremptory such that, once it takes place, if the respondent does not appear or duly excuse his or her failure to appear, he or she may be declared absent, and the respective proceedings can take place.

1510 **Conventus, qui citatoriam schedam recipere recusset, vel qui impedit quominus citatio ad se perveniat, legitime citatus habeatur.**

A respondent who refuses to accept a document of summons, or who circumvents the delivery of a summons, is to be regarded as lawfully summoned.

SOURCES: c. 1718; *NSRR* 70 § 1; *PrM* 82

CROSS-REFERENCES: cc. 1592, 1593

COMMENTARY

Santiago Panizo Orallo

Two issues are discussed in this canon: the "document of summons" and deeming a person lawfully summoned who refuses to receive that document or prevents it from getting into his or her hands.

Regarding the material formalities of the document of summons, the *CIC*—unlike what occurred in cc. 1715–1716 *CIC*/1917—makes no provision regarding the physical make-up of the document by which one is summoned. However, concerning this issue, the provisions of the previous legislation may be followed.

According to *CIC*/1917, one summons must be delivered to the interested party, and one must remain in the court file as proof of the terms of the summons and its service on the interested party. Delivery to the interested party constitutes the notification of the summons decree.

The summons must contain the following elements for validity:

— an order by the judge to appear before the tribunal;

— the name of the person being cited;

— the name of the plaintiff and of the respondent;

— the reason for the summons (answer to the complaint; appearance to give testimony; particular proceeding in question; etc.);

— the year, month, day, and time to appear;

— and the signature of the judge and notary.

If the document lacks any elements considered necessary for true personal notification, the summons is deemed incomplete, and any legal consequences of it will not apply.

The summons must be delivered personally to the interested party or to his or her procurator or curator, if any. If the summoned party is not at home, it may be delivered to any person who promises to deliver it to him or her as soon as possible, and there should be an attempt to have the person receiving the document sign a promise to deliver it to the party in question. A summons delivered to a family member or person who lives with the summoned party can be considered a true summons and, in case of a failure to appear, it is appropriate to proceed to the declaration of absence. With respect to notification, the procedural effects result not so much from the summons as from its service, which consists of delivery of the summons to its recipient.[3]

Canon 1510 provides that a respondent must be deemed lawfully summoned if he or she refuses the document of summons or circumvents its delivery. Therefore, when the respondent refuses or circumvents delivery of the summons, he or she must be considered served with all its legal consequences. There must be proof in the court record of the rejection of the summons or of the impediment created by the respondent.

3. Cf. J.J. GARCÍA FAÍLDE, *Nuevo Derecho procesal canónico* (Salamanca 1984), p. 73.

1511 **Si citatio non fuerit legitime notificata, nulla sunt acta processus, salvo praescripto can. 1507 § 3.**

Without prejudice to the provision of Can. 1507 § 3, if a summons has not been lawfully communicated, the procedural acts are null.

SOURCES: c. 1723; *PrM* 84

CROSS REFERENCES: cc. 1459 § 1, 1507 § 3, 1508 § 2, 1512, 1619, 1620, 1622

COMMENTARY

Santiago Panizo Orallo

The judge must be meticulous in compliance with the summons formalities, because if the summons has not been lawfully served and the defect is not compensated for by the summoned party's appearance before the tribunal, the procedural acts are null.

Canon 1894,1° *CIC*/1917 sanctioned with remediable nullity the lack of a lawful summons, which included unlawful or incomplete drafting of the summons, as well as its unlawful service or notification. The *CIC* only sanctions with nullity of the proceedings a summons that is not lawfully notified.

One might wonder whether a summons that does not contain essential information of the *vocatio in ius* would not involve nullity of procedural acts, with the consequence of invalidity of the entire process. In current discipline and practice, the petition is usually attached to the summons, and the petition contains all the substantial elements of the cause. Therefore, for the summons to be valid, it does not have to contain all the information required by c. 1715 *CIC*/1917, because it may be deduced from the petition. However, if the substantial elements of the summons cannot be deduced from the petition or if the judge should decide, pursuant to c. 1508 § 2, to not communicate the petition to the respondent, the summons, even if lawfully served, could be null if it does not contain the essential information of the *vocatio in ius*.

In c. 1894,1° of the *CIC*/1917, the lack of a lawful summons constituted a defect of remediable nullity of the judgment. In the *CIC*, this defect is not included among the defects of irremediable nullity of c. 1620 or among those that can be remedied in c.1922. Therefore, c. 1619 would apply to a defect in the summons, according to which, "whenever a case concerns the good of private individuals, acts which are null with a nullity

established by positive law are validated by the judgment itself, if the nullity was known to the party making the complaint and was not raised with the judge before the judgment."

Nevertheless, one may wonder whether the lack of a summons or an unlawful summons of the respondent could create a nullity that can be considered established by positive law or whether it generates a nullity resulting from the nature of the procedural order. Without a lawful summons, the procedural relationship cannot be established with normalcy nor can the gap be bridged in the indispensable relationship of the respondent to the cause being tried. Moreover, pursuant to c. 1512, effects result from the summons that are substantial to that same procedural order. There are cases in which the absence of a party in the process results from a lack, absence or defect in the summons. As stated by de Diego-Lora in the commentary on c. 1511, in these cases, that "judgment would not validate something which by nature cannot be validated,"[4] and that absent or unlawful summons would fit in the phenomena of irremediable nullity of the judgment in accordance with c. 1620,4°: the cause was not actually initiated against any respondent; or under conditions of the respondent's defenselessness. This would also occur when there are causes related to the public good: this situation could be included among the cases of remediable nullity of the judgment according to c. 1622,5°.

In all the situations contemplated, pursuant to c. 1459 § 1, the defect can be posed as an exception or be raised by the judge at any stage or grade of the trial.

4. C. DE DIEGO-LORA, commentary on c. 1511, in *Pamplona Com.*

1512 **Cum citatio legitime notificata fuerit aut partes coram iudice steterint ad causam agendam:**

1° res desinit esse integra;

2° causa fit propria iudicis illius aut tribunalis ceteroquin competentis, coram quo actio instituta est;

3° in iudice delegato firma redditur iurisdictio, ita ut non expiret resoluto iure delegantis;

4° interrumpitur praescriptio, nisi aliud cautum sit;

5° lis pendere incipit; et ideo statim locum habet principium "lite pendente, nihil innovetur."

Once a summons has been lawfully communicated, or the parties have presented themselves before a judge to pursue the case:

1° the matter ceases to be a *res integra;*

2° the case becomes that of the judge or of the tribunal, in other respects lawfully competent, before whom the action was brought;

3° the jurisdiction of a delegated judge is confirmed so that it does not lapse on the expiry of the authority of the person who delegated;

4° prescription is interrupted, unless otherwise provided;

5° the suit begins to be a pending one, and therefore the principle immediately applies 'while a suit is pending, no new element is to be introduced'.

SOURCES: c. 1725; *NSRR* 85; *PrM* 85

CROSS REFERENCES: cc. 146, 1405 § 1,4°, 1415, 1461, 1515, 1622,5°

COMMENTARY

Santiago Panizo Orallo

Canon 1512 is practically the same as *CIC*/1917 c. 1725: a lawful summons closes the relational arc of the process and completes the constitution of the procedural relationship between the parties and between the parties and the judge. The bonds derived from this relationship between the parties, the judge and the object of the process begin with, and arise from, the lawful summons and through it arise. Therefore, in the strict sense, the summons marks the initiation of the process.

There are two fundamental effects of the summons indicated in this canon: substantive effects and procedural effects.

1. *From the substantive point of view*

a) The first effect is that "the matter ceases to be a neutral one." Therefore, the situation presented by the petition becomes a litigious one, and the litigation between the two parties under the authority of the judge is initiated. This clears up a long-standing controversy regarding the origin of the trial, namely whether it is initiated with the summons or with the answer to the complaint. According to modern procedural doctrine, the beginning of the trial is not the petition, because the relational arc of the parties to each other and to the tribunal is not closed by it, although it is indicated. Nor is the beginning of the trial at the joinder of issue, in which the matter of the trial is established and fixed. The lawfully served summons completely closes the procedural relationship with the *vocatio in ius* of the respondent, which becomes a passive element of the procedural relationship. The petition initiates the process by relating the plaintiff to the tribunal, but this relationship is complete when the *res litigiosa* is referred to a specific respondent, which produces the summons and nothing more. The answer to the petition establishes and specifies the matter of the trial, but it implies that the procedural relationship is fully formed and constituted, since the respondent answering the petition is already integrated into the procedural relationship, and the answer is a consequence of his or her summons-appearance.

With the summons, "the thing [the matter] ceases to be a *res integra*." The matter loses its own substantive independence and is subjected to the judicial procedure, coming to depend on the result of the judgment. In addition, the matter is no longer neutral and becomes conflictive and litigious.

b) The second substantive effect lies in the fact that the summons interrupts prescription, unless otherwise provided.

This effect of the summons cannot be attributed to a lack of good faith, which can exist—according to c. 1515—until the answer to the petition: it is more an effect caused by law. And it seems logical: through notification of the summons, the respondent is called to trial, but the call in the strict sense is one thing and it is another to take responsibility for what that call entails, which takes place subsequent to the joinder of issue. It is the organizational order that makes the summons coincide with the end of the prescription.

2. *From the juridical-formal point of view*

From the juridic-formal point of view, the lawful summons has particular effects.

a) In the first place, an effect of the summons is what is called *perpetuation of jurisdiction*: that is, at the time of the notification of the summons, the effects of prevention are created and the judge who has first ordered the summons becomes exclusively competent from that time on excluding any others who may be competent for various reasons.

The summons not only nullifies the competence of any other judges who may be competent, but it also perpetuates the competence of the first judge to summon the respondent: and this is regardless of any changes that may occur, such as a change of domicile or in the condition of the matter in dispute.

This effect proves the axiom "semel iudex, semper iudex," which principle cannot be contradicted except through a declaration of absolute incompetence (c. 1461), through a positive outcome of an exception of relative incompetence (c. 1460), through a correct claim of "forum praeventionis" (c. 1415), or through the possible reservation of the cause by the Roman Pontiff (c. 1405 § 1,4°).

b) Second, the summons has an effect similar to the previous one: the jurisdiction of the delegated judge is consolidated, perpetuated, and made firm, which continues beyond the permanency of the person who delegates: once the respondent is summoned by the delegating person, the delegated judge is no longer affected by anything that could happen to the jurisdiction of the person who has delegated.

c) Last, the summons marks the beginning of the "lis pendens" and the principle that "lite pendente, nihil innovetur" immediately applies.

The "lis pendens" is a state of litigation that is pending resolution before a given tribunal until the matter is resolved by a definitive judgment.

Here the former judicial controversy over the beginning of the lis pendens is also resolved. The canonical organization locates this beginning with the summoning of the respondent, because, absent that circumstance, the respondent has not yet entered the trial nor can any procedural prejudice be deduced from the trial.

During the *lis pendens*, the matter in dispute cannot be subjected to any other process and, should anyone attempt this, this intent could be prevented with the exception of *lis pendens*.

Once the *lis pendens* begins, neither party can make use of the thing subject to litigation such that the condition of the thing would be altered in prejudice to whomever in law has the right to make use of it according to the definitive judgment.

The *lis pendens* exception is supported by the principle of procedural economy, which requires that two or more processes on the same litigation be avoided. It rests on the need to avoid different and even contradictory judgments on the same litigation, as well as on the fact that

it would be unfair to force the respondent to defend him or herself in different processes regarding the same matter.

In addition to said exception, lis pendens has a positive effect in canon law, which is expressed in the wording of c. 1512,5° "while a suit is pending, no new element is to be introduced." Any innovation while the suit is pending constituted an "attack" according to the previous canonical legislation (cc. 1854–1855 *CIC*/1917). In the *CIC*, the violation of this principle is only subject to a possible action for nullity, which would be corrected by the judgment pursuant to c. 1619 in causes concerning the private good; while in causes concerning the public good, the provisions of c. 1622,5° would have to be complied with.

The *lis pendens* exception is to the instance what the adjudged matter is to the action, in that it seeks to prevent the unnecessary birth of a process, while the adjudged matter exception extinguishes the action.

TITULUS II
De litis contestatione

TITLE II
The Joinder of the Issue

INTRODUCTION

Antoni Stankiewicz

1. *Origin and historical significance of the "joinder of the issue"*

The *litis contestatio*, which has its origin in the ancient Roman civil process, has been retained in the canonical procedural system,[1] despite its disappearance from other procedural systems. During the revision of the *CIC*/1917, some were in favor of deleting it, because it was thought to be useless as *stadius aliquis formalis processus* for the definition of the terms of the dispute. It was believed that its function could be assigned to the judicial summons[2] or the questioning of the parties.[3]

However, the joinder of issue remains the first procedural act in which the parties state their opposing claims. It is formally required in all processes, including documentary processes (cf. c. 1686) and penal processes (cc. 1723 § 2, 1728 § 1), and in main causes, as well as in incidental matters that must be resolved by an interlocutory judgment (cc. 1590 § 1, 1607).

Therefore, this procedural act serves to specify the object of the process through the definition of the terms of the dispute (c. 1513 § 1). In fact, the dispute properly becomes litigation with the procedural answer

1. Cf. P. TORQUEBIAU, "Contestatio litis, in Dictionnaire de Droit Canonique," IV (Paris 1949), cols. 475–492; E. MAZZACANE, *La litis contestatio nel processo civile canonico* (Naples 1954); M. CABREROS DE ANTA, "La litiscontestación en el proceso canónico," in *Nuevos estudios canónicos* (Vitoria 1966), pp. 671–719; J. OCHOA, "'Actio' e 'contestatio litis' nel processo canonico," in *Atti del Colloquio romanistico-canonistico* (February, 1978) (Rome 1979), pp. 359–390. R. COLANTONIO, "La litis contestatio," in *Il processo matrimoniale canonico*, 2nd ed. (Vatican City 1994), pp. 491–538.
2. *Comm.* 11 (1979), pp. 92–93.
3. Cf. I. GORDON, "De nimia processuum matrimonialium duratione," in *Periodica* 58 (1969), p. 686.

incipit lis a contestatione (Cuiacius), although in canonical tradition, the litispendence begins with the notification of the summons (c. 1512,5°).

Acceptance of the Roman *litis contestatio* in canon law took place in the medieval period, with the rebirth of Roman law, with the acceptance of the *litis contestatio* that survived in the Justinian code. This joinder of issue, unlike the *litis contestatio* of the private procedural system of the *legis actions* and of the formulaic process, did not consist of a calling of witnesses by the parties (*testes estote*: Fest. 50 L.) for confirmation of the terms of the issue, or of an agreement between the parties, assisted by the magistrate, on the formulation of the dispute, similar to the concept of the contract. Rather, it took place after the *narratio* had developed (the enunciation of the plaintiff's reasons), and the *contradictio* had been filed (the denial by the respondent) (*C* 3, 1, 1, 14). Therefore, the joinder of issue took place when the plaintiff narrated aloud the facts that constituted the object of the dispute, and in this manner, the judge began to hear the cause (*C* 3, 9, 1) through the antithetical positions of the parties (*C* 2, 58, 2).

2. *Necessity and character of the "joinder of the issue"*

Canonical doctrine and jurisprudence during the period of the commentators on the Pio-Benedictine Code held that the joinder of issue, received in the ecclesial forum, has been the cornerstone and foundation of the canonical procedural system (*lapis angularis et fundamentum iudicii*)[4] since the time in which—as provided by Gregory IX—its omission caused nullity of the process (*X* II, 5, 1). Although the formal relevance of this institution in the process has diminished, its substance retains the fundamental meaning by which it refers to the determination of the terms of litigation in the establishment of an adversarial action between the parties.

This moment in the litigation was first manifested through the declaration of the claim of the plaintiff, made at the trial (still called *in iure*, according to the expression of the ancient Roman private process), followed by the respondent's answer. In fact, as established by Gregory IX, the joinder of issue must be developed *per petitionem in iure propositam et responsionem secutam*. However, the litigious intent that must accompany the opposing statements of both parties—later defined with the phrase *animus litigandi*, still used in c. 1726 *CIC*/1917—already in the time of Gregory IX, could not consist of *positiones et responsiones* (*X* II, 5, 1), that is, of the particular factual or legal claims with evidentiary purposes. This is because these claims exceed the general intent of establishing the

4. M. LEGA–V. BARTOCCETTI, *Commentarius in iudicia ecclesiastica*, II (Rome 1950), p. 545; C. DE JORIO, January 27, 1965, in *SRR Dec* 57 (1965), p. 84, no. 9.

judicial litigation, which, consequently, must refer to the object of the trial as a whole.

However, with the elimination of the joinder of issue in the summary process by the Clementine Decretal *Saepe* (*Clem.* V, 11, 2), this process immediately began to prevail over the ordinary process, and legal usage had to introduce a notable simplification in the solemnities of this institution. Thus, the *animus litigandi* of the plaintiff was identified in the act of the presentation of the petition, the recitation or oral confirmation of which fell into disuse, while the conclusive moment of the joinder of issue began to focus on the respondent's *contradictio* to the plaintiff's *petitio*, which was still required by the *CIC*/1917 (c. 1726).

Given that the canonical process is written, the joinder of issue must be included among the procedural acts. This requirement refers not only to the ordinary contentious trial (c. 1513), but also to the oral contentious trial (c. 1661 § 1), albeit only for the purposes of documentation.

However, when the *CIC*/1917 was in force, the Rota did not find it necessary for validity that there be a formal joinder of issue, with the required drafting of the verbal acts of the claims (c. 1727 *CIC*/1917), or with the drafting of the *dubium* formula (c. 1729 §§ 1–3 *CIC*/1917).[5] Certainly, for the validity of the process, it is sufficient to determine that the joinder of issue has been substantially given. It must be considered validly observed when, from the acts, the terms of the dispute are specified, that is, the *petitum* and the *causa petendi*, known by the parties, who must be able to exercise the right to defense, to which the judgment must appropriately respond (c. 1611,1°).

Therefore, the statement at times repeated by doctrine and by jurisprudence must be interpreted to the effect that the joinder of issue comes from natural law.[6] Nevertheless, the reference to natural law can only affect the determination of the object of the dispute, without which it would be impossible to pronounce judgment. In addition, that determination belongs to the essence of the trial, regardless of the method by which it is carried out. Therefore, the solemnities by which the terms of the dispute are established do not come from natural law. They include, for instance, the methods prescribed by law, the conclusive formulas of the joinder of issue, or the presence of the parties before the judge for this purpose.

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5. Cf. A. HANSSEN, *De nullitate processus canonici* (Rome 1938), p. 106; E. MAZZACANE, *La litiscontestatio...*, cit., p. 137; C. SEBASTIANELLI, March 5, 1915, in *SRR Dec* 7 (1915), p. 74, no. 4; C. JULLIEN, February 8, 1936, in *SRR Dec* 28 (1936), p. 120, no. 7; C. STAFFA, October 7, 1949, in *SRR Dec* 41 (1949), p. 475, no. 4; C. ANNÉ, October 17, 1964, in *SRR Dec* 56 (1964), p. 710, no. 2; C. DE JORIO, January 27, 1965, in *SRR Dec* 57 (1965), p. 84, no. 9; p. 92, no. 24; C. BEJAN, April 27, 1966, in *SRR Dec* 58 (1966), p. 225, no. 4.

6. Cf. F.X. WERNZ-P. VIDAL-F. CAPPELLO, *Ius canonicum*, VI, *De processibus*, 2nd ed. (Rome 1949), p. 358; C. POMPEDDA, February 27, 1984, in *SRR Dec* 76 (1984), p. 124, no. 8.

However, the presence of one party or the other before the judge for the joinder of issue, required at times (c. 1727 *CIC*/1917), or left to the discretion of the judge (cc. 1507 § 1, 1513 § 2, 1677 § 2), is not without procedural significance. In fact, it tends to not only safeguard the judicial adversarial situation, but also, according to the common opinion of canonists held since medieval times, to manifest the quasi-contractual nature of this procedural institution, taking into account the similarity between carrying out the joinder of issue and the contractual will, for which also *in iudicio quasi contrahitur.* Nevertheless, this opinion should be deemed completely reversed, according to which opinion the joinder of issue would have a *quasi contractus* nature, maintained by some commentators on the former Code,[7] which could find support in Roman doctrine on the contractual nature of the *litis contestatio* of the formulaic process. This is because it cannot be reconciled with the public nature of the canonical process and with the judge's function in determining the terms of the dispute (c. 1513 § 1). For this reason, the framework of the binding relationship cannot be applied to the joinder of issue. Moreover, in the new procedural legislation, the effect of quasi-contractually establishing the object of litigation cannot be attributed to the joinder of issue, because the specification of that object devolves exclusively upon the judge (c. 1513).[8]

Therefore, the joinder of issue must only be considered a merely procedural act of a declarative nature.

7. Cf. M. LEGA-V. BARTOCCETTI, *Commentarius...*, cit., II, pp. 563–564; in contrast: F. ROBERTI, *De Processibus*, I (Rome 1926), p. 452.
8. Cf. *Comm.* 2 (1970), p. 190; 11 (1979), pp. 93, 261.

1513 **§ 1. Contestatio litis habetur cum per iudicis decretum controversiae termini, ex partium petitionibus et responsionibus desumpti, definiuntur.**

§ 2. Partium petitiones responsionesque, praeterquam in libello litis introductorio, possunt vel in responsione ad citationem exprimi vel in declarationibus ore coram iudice factis; in causis autem difficilioribus partes convocandae sunt a iudice ad dubium vel dubia concordanda, quibus in sententia respondendum sit.

§ 3. Decretum iudicis partibus notificandum est; quae nisi iam consenserint, possunt intra decem dies ad ipsum iudicem recurrere, ut mutetur; quaestio autem expeditissime ipsius iudicis decreto dirimenda est.

§ 1. The joinder of the issue occurs when the terms of the controversy, as derived from the pleas and the replies of the parties, are determined by a decree of the judge.

§ 2. The pleas and the replies of the parties may be expressed not only in the petition introducing the suit, but also either in the response to the summons, or in statements made orally before the judge. In more difficult cases, however, the parties are to be convened by the judge, to agree the question or questions to which the judgement must respond.

§ 3. The decree of the judge is to be notified to the parties. Unless they have already agreed on the terms, they may within ten days have recourse to the same judge to request that the decree be altered. This question, however, is to be decided with maximum expedition by a decree of the judge.

SOURCES: § 1: cc. 1726, 1727, 1729 § 3; *NSRR* 76 §§ 1 et 2; *PrM* 87, 92; *SNAS* 38; CPAC Rescr., 28 apr. 1970, nos. 10, 11
§ 2: cc. 1728, 1729 § 2
§ 3: *NSRR* 73

CROSS REFERENCES: § 1: cc. 1639 § 1, 1640, 1661 § 1, 1677 § 2, 1723 § 2
§ 2: cc. 1507 § 1, 1592 § 1, 1594, 1611,1°, 1661 § 1, 1677 §§ 2–3
§ 3: cc. 1505 § 4, 1527 § 2, 1591, 1629,5°

COMMENTARY

Antoni Stankiewicz

1. *Decree of the judge* (§ 1)

Although the object of the controversy must be indicated in the petition (cc. 1502, 1504,1°–2°) and the summons (c. 1507 § 1), it is judicially established with the joinder of issue (cf. c. 1726 *CIC*/1917). Therefore, with this procedural act, the terms of the controversy are defined *iudicialiter*,[1] in such a way as the essence of the act is constituted by the establishment of the terms by the judge, and not other elements, such as the *contradictio* of the respondent to the plaintiff's claim with a view to the trial. This was maintained by an authorized opinion even while the *CIC*/1917 was in force.[2]

The intervention by the judge is not only formal and belonging to the solemnity of the act, as it was considered in the past, nor is it only necessary in the event of dissension between the parties on the agreed-upon formula (c. 1729 § 3 *CIC*/1917), or in the absence of one of the parties (c. 1729 § 1 *CIC*/1917). Instead, it is essential to the decision by which the judge himself must judicially establish the controversy.

In fact, the Code highlights the joinder of issue as an act of the judge, who defines it by a procedural decree (cf. c. 1617) of a declarative nature, inasmuch as the terms of the controversy must be deduced from the pleas and the replies of the parties.

The conclusive formula for establishing the essential points of the controversy is not the same for all causes, but it can be distinct in its form, as long as the *causa petendi* is clearly defined in juridical terms. Cases in which the law itself imposes the use of one formula for the *dubium*, such as in matrimonial causes (cf. c. 1677), are excepted. Therefore, everything is left to the judge, who will establish the terms of the controversy ex officio.

The decree is issued in writing (cf. c. 1472 § 1) by the presiding judge or ponens, without convening the parties, after the reply of the respondent. The form of the decree containing the judge's pronouncement, unlike what was provided in c. 1727 *CIC*/1917, cannot be merely an insertion in the acts of the antithetical claims of the parties, because the current norm provides that the judge must establish the terms of the controversy.

1. *Comm.* 11 (1979), p. 93.
2. Cf. F. ROBERTI, *De Processibus*, I (Rome 1926), p. 453.

2. *Simple and solemn joinder of the issue* (§ 2)

The canonical norm seems to distinguish the simple *litis contestatio* from the complex or solemn one.

The simple joinder of issue takes place in causes that do not present special difficulties in the definition of the terms of the controversy, because the terms are easily identifiable in the introductory petition (c. 1504), the respondent's reply to the summons (c. 1507 § 1), or in the respondent's oral statement before the judge (c. 1507 § 3).

On the other hand, the complex joinder of issue occurs in more difficult causes (c. 1728 *CIC*/1917), which involve considerable difficulty in the identification of the essential points of the controversy. This difficulty can arise not only from the intrinsic complexity of the cause itself, but also from extrinsic reasons, such as the cumulation of actions proposed by the plaintiff (c. 1493) or exceptions presented by the respondent for that purpose (cc. 1459 § 2, 1462 §§ 1–2), which must normally be resolved before the principal case (c. 1587); either because the judge deems it appropriate, or even necessary, to convene the parties (c. 1507 § 1), or because one of them is requesting a hearing (cf. c. 1677 § 2). The session also can be necessary because of the connection of causes, as would occur with a counteraction brought by the respondent (c. 1463 § 1).

The complex joinder of issue takes place in a hearing at the tribunal, for which purpose the judge must convene the parties or their representatives (cc. 1481 § 1, 1484 § 1) and, if they are intervening in the cause, the promoter of justice and the defender of the bond (cf. c. 1434,1°). During the hearing, after having heard the pleas and replies of the parties, the judge defines the terms of the controversy only with the formula of the *dubium* or *dubia* which the judgment must answer (c. 1611,1°). For this reason, this hearing is called a session *ad dubium vel dubia concordanda*, inasmuch as in it the joinder of issue also takes the form of a concordance on the *dubium*, that is, *per dubii concordationem*.

In a cumulation of actions that are not contradictory, the formulation of the *dubia* can be done in an equal manner. On the other hand, it is subordinate when the actions are contradictory, as "if the right to ownership of the rural property is proven in favor of the plaintiff; and if not, if there is proof of the usufruct" (for matrimonial causes, cf. c. 1677 § 3).

All those present must sign the acts of the hearing, drafted by the notary (c. 1437 § 1). In the Roman Rota, the notary does not usually participate in the hearing, but only signs the notification of the decree (cf. *NSRR*, Arts. 57 § 2; 58 § 1).

If, on the day set for the joinder of issue, the plaintiff does not appear, without giving a just excuse, c. 1594 will apply. On the other hand, if the respondent does not appear, without a just excuse, or if the respondent has not replied in writing to the summons (c. 1507 § 1), the formula of the *dubium* is established, taking into account the claim of the plaintiff.

The trial will take place in the absence of the respondent, pursuant to c. 1592.

The concordance of the *dubium* results from the practice that evolved and was observed before the Tribunal of the Roman Rota until September 20, 1870. In it, the ponens, in the *relatio*, had to set forth the issue in dispute in the form of the doubt, amendable *in Rota*. This *dubium* was reported to the parties. If the ponens had to formulate the *dubium* before the *relatio*, he could do so in collaboration with the parties, who were convened *ad concordandum dubium*.[3]

This practice of establishing the doubt in a hearing called for that purpose was applied to the joinder of issue by the *Lex propria* of the Rota and the Apostolic Signatura of June 29, 1910 (cc. 23–24), the respective *Regulae servandae* before the Rota, of August 4, 1910 (§§ 19,1°, 32,1°–3°), and before the Apostolic Signatura of March 6, 1912 (Arts. 29, 32–35, 37). Thus, the concordance of the *dubium* became an expression synonymous with the joinder of issue *contestatio litis seu dubiorum concordatio*. Subsequently, the practice was accepted by the *CIC*/1917 (cc. 1728, 1729) and by later procedural norms, namely the Instruction Provida Mater 88 and the *Normae* of the Rota of June 29, 1934 (Arts. 74, 76 §§ 1–2, 77) and of the Apostolic Signatura of March 25, 1968 (Arts. 36–40).

3. *Notification to the parties of the decree* (§ 3)

The decree of the joinder of issue must be reported to the parties. The notification serves as proof for the parties of the object of the trial formulated in juridical terms.[4] According to canonical tradition (cf. c. 6 § 2), the decree of the joinder of issue must also be reported to a party declared absent from the trial.[5]

The parties may appeal the decree before the judge who issued it.[6] In this way, the norm contained in the *Regulae servandae* of the renewed Rota of 1910 became universal (§ 32,3°). However, in the absence of an express norm, while the *CIC*/1917 was in force, prevailing procedural doctrine did not allow this decree to be challenged, unless it was with the definitive judgment, because it was a procedural decree and did not possess the efficacy of the definitive judgment.

The issue of amending the decree must be resolved as quickly as possible (*expeditissime*), and the new decision of the judge cannot be appealed (c. 1629,5°).

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3. Cf. E. CERCHIARI, *Capellani Papae et Apostolicae Sedis Auditores Causarum Sacri Palatii Apostolici, seu Sacra Romana Rota ab origine ad diem usque 20 septembris 1870*, I/1 (Rome 1921), p. 231.
4. *Comm.* 15 (1984), p. 64.
5. Cf. c. 24 §1 *Lex propria*; c. 1729 §1 CIC/1917; art. 72 §1 NSRR (1934); art. 89 §3 PME; art. 60 §3 NSRR (1994); *Comm.* 11 (1979), p. 92.
6. *Comm.* 11 (1979), p. 93.

1514 Controversiae termini semel statuti mutari valide nequeunt, nisi novo decreto, ex gravi causa, ad instantiam partis et auditis reliquis partibus earumque rationibus perpensis.

Once determined, the terms of the controversy cannot validly be altered except by a new decree, issued for a grave reason, at the request of the party, and after the other parties have been consulted and their reasons considered.

SOURCES: cc. 1729 § 4, 1731,1°; *NSRR* 76 § 3; *SNAS* 42

CROSS REFERENCES: cc. 1611,1°, 1620,4°, 1639 § 1, 1683

COMMENTARY

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The joinder of issue does not have the effect of novation of the relationship taken to trial, with the resulting substantive and procedural efficacy, as occurred in Roman private procedural law. However, canonical doctrine usually connects the substantive and procedural effects with the moment of the *litis contestatio*, even if some of them must be connected with the summons and its notification (cf. c. 1512) and, especially, with the *lis pendens*.

One of the procedural effects of the joinder of issue is the definitive determination of the object of the trial, with the immutability of the judicial complaint and the opening of the instruction phase of the process. Nevertheless, this canon does not expressly establish a ban on changing the petition, that is, on the *mutatio libelli*, as did the *CIC*/1917 (c. 1731,1°). Rather, it is a ban on changing the terms of the controversy established by the judge, which can only indirectly refer to a change in the judicial petition, when it affects a change in the *causa petendi*.

According to the canonical norm, the terms of the controversy, once established judicially, become an integral part of the judge's decree (c. 1513 § 1). That is why they cannot be validly amended except *ex gravi causa*, through a new decree of the judge, issued at the instance of a party, only after the arguments of the other party and the promoter of justice and the defender of the bond, if they are participating, have been heard and considered.

However, in causes related to the public interest, such as in causes on the nullity of marriage, it is still possible for the judge to change the terms, even ex officio (cf. c. 1452 § 1), provided that the other conditions established in c. 1514 are met.

A substantive change in the terms of the controversy cannot take place because of a mere factual specification, or because greater clarification of the fact itself, the circumstances, or other reasons must be given (cf. c. 1731,1° *CIC*/1917)—as would occur, for example, in causes on the nullity of marriage when specifying whether an inability to assume the essential obligations of marriage is due to a psychosis or a personality disorder—but when the *causa petendi* changes. On the other hand, for an amendment to the *causa petendi*, the consent of the other party is no longer required (as in c. 1731,1° *CIC*/1917), but only a hearing of this party.

A trend in jurisprudence has come to maintain that the ban on changing the terms was not violated by a change of the *nomen iuris* that the parties had given to the fact submitted to trial, not even when the judge changes the terms of the controversy in the deliberation meeting for pronouncement of the judgment.[1] But, that opinion cannot be supported in judicial practice, because even a formal change of the *petitum* or the *causa petendi* exposes the judge to the risk of pronouncing a null judgment, not only due to the pronouncement *extra vel ultra petita* (cf. c. 1620,4°), but also due to a violation of the respondent's right to defense because of a change in the object of the trial without his or her knowledge (c. 1620,7°).[2]

The ban on changing the terms of the controversy does not prevent the addition of a new *causa petendi* during the process, which will follow its normal procedural *iter* even if it is still closely connected to the first one, and it must be established through a new joinder of issue. This possibility is ruled out only in the appeal process (c. 1639 § 1), except for causes on the nullity of marriage (c. 1683).

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1. Cf. C. DE JORIO, May 13, 1964, in SRR Dec 56 (1964), p. 353, no. 2; C. BEJAN, October 17, 1973, in SRR Dec 65 (1973), p. 655, no. 3.
2. Cf. A. STANKIEWICZ, "De nullitate sententiae 'ultra petita' prolatae," in *Periodica* 70 (1981), pp. 221–235.

1515 Lite contestata, possessor rei alienae desinit esse bonae fidei; ideoque, si damnatur ut rem restituat, fructus quoque a contestationis die reddere debet et damna sarcire.

Once the joinder of the issue has occurred, the possessor of another's property ceases to be in good faith. If, therefore, the judgement is that he or she return the property, the possessor must return also any profits accruing from the date of the joinder, and must compensate for damage.

SOURCES: c. 1731,3°

CROSS REFERENCES: cc. 198, 1512,4°

COMMENTARY

Antoni Stankiewicz

The provision in this canon relates the substantive effect referring to the moment the possessor is no longer in good faith to the joinder of issue, as an *exordium litis*. However, according to juridical logic, that effect must already have occurred with the possessor respondent's receipt of notification of the summons, together with the judicial petition, because from the moment of the litispendence (c. 1512,5°) the respondent is in a situation of uncertainty regarding the legitimacy of his or her possession. This is why, once the summons is served, prescription is also interrupted (c. 1512,4°), and one of the constitutive elements of prescription is good faith (c. 198).

However, canon law does not seek to create a juridical obligation only through the onset of formal uncertainty, based on the statement in the other party's claim, which can exist at the same time as the possessor's subjective persuasion regarding the lawfulness of his or her possession. That persuasion can justify his or her opposition to the plaintiff's claim. Perhaps, for this reason, and not just because of the concept that the joinder of issue is the cornerstone of the trial, the legislator determines that the possessor, should he or she lose, must return not only the thing, but also its profits, and compensate for damages from the moment of the joinder of issue.[1] The infrequency of disputes of this type before ecclesiastical tribunals renders unrealistic the danger that the possessor respondent may try to delay the joinder of issue, even in bad faith, to reduce as much

1. *Coram* MASSIMI, January 23, 1926, in *SRR Dec* 18 (1926), pp. 15–16, no. 9.

as possible the time to which the order for restitution of profits and damages can apply. However, the canon ensures juridical protection of the possessor's alleged subjective certainty, at least until the joinder of issue, in spite of the initial answer made when notified of the summons to trial.

The concept of good or bad faith—which ceases for the possessor, or which must start with the joinder of issue—is controversial in canonical doctrine. According to prevalent opinion, the *bona fides* alluded to in this canon should not be understood to exclude the *conscientia rei alienae* (cf. *X* II, 20, 20) on the basis of the absence of sin on the part of the possessor. Instead, it should be understood in a juridical sense, although in this canon, the shift of good faith to *mala fides iuridica* does not involve or require so much a change in the possessor's subjective certainty regarding a possible violation of the right to another's property as the establishment of a guarantee of preservation of the thing in dispute in the trial. In other words, the cessation of good faith must be understood in the sense that the possessor, from the joinder of issue until the judgment order, is obligated to diligently conserve the thing and its profits, which he or she must return in full to the plaintiff if the respondent loses. If the thing deteriorates or profits are lost, the possessor is also obligated to compensate the plaintiff for damages resulting from his or her negligence.

1516 Lite contestata, iudex congruum tempus partibus praestituat probationibus proponendis et explendis.

Once the joinder of the issue has occurred, the judge is to prescribe an appropriate time within which the parties are to present and complete the proofs.

SOURCES: c. 1731,2°; *NSRR* 73

CROSS REFERENCES: cc. 1529, 1677 § 4

COMMENTARY

Antoni Stankiewicz

The joinder of issue concludes the introductory phase of the process and opens the instruction phase for the presentation of evidence, which is ordered in this procedural act. According to the principle of regular sequencing of the procedural acts, the formal ban on collecting evidence before the joinder of issue applies, unless there is a grave reason for doing so (c. 1529) or it is evidence indicated (c. 1504,2°) or exhibited with the judicial petition.[1] However, this ban is not directly related to the joinder of issue as a formal procedural act, but to the fact that, until it occurs, the object of the controversy to which the instruction of the case must refer has not yet been definitively established.

Therefore, once there is a joinder of issue, the judge orders in his procedural decree the opening of the instruction phase of the process (cf. c. 1677 § 4), setting a brief term for the parties to present evidence, as well as an appropriate term for its completion, taking into account that causes should not last longer than one year at the first instance, or more than six months in the appeal (c. 1453).

The setting of the term for the presentation of evidence is at times unnecessary: this would occur if the evidence had already been sufficiently indicated by the plaintiff in the petition and in the respondent's answer to the summons (c. 1504,2°). Moreover, during the questioning of the parties, at the invitation of the judge, they may still present evidence or complete the recounting of any evidence that has been presented.

The instruction activity of the cause involves cooperation among the judge and the parties, who have the main initiative in the exercise of this procedural duty-right. However, in the absence of the joint activity with

1. Cf. *Comm.* 11 (1979), p. 99.

the *agitatio actionis*, the judge may proceed ex officio, and should do so in penal causes and in others affecting the public good of the Church or the salvation of souls (c. 1452 § 1), provided he finds it necessary to avoid a gravely unjust judgment (c. 1452 § 2).

The opening of the instruction phase, which takes place after the joinder of issue, also precludes any exceptions that may hinder the normal development of the process in the attitude of trustworthiness among the parties.

Therefore, the parties' right to file dilatory exceptions—unless they arise after the joinder of issue (c. 1459 § 2)—or peremptory exceptions lapses, called *litis finitae*. Although for these latter exceptions there is no absolute prohibition, the order to pay costs is provided in the event that the filing was maliciously delayed (c. 1462 § 1).

TITULUS III
De litis instantia

TITLE III
The Trial of the Issue

INTRODUCTION

Joan Carreras

1. *Analogy of the term "issue"*

From an etymological point of view, the judicial instance is the request for justice made to the judge or jurisdictional authority. Logically, this implies the existence of an activity performed by a person with a view to requesting or demanding something. Moreover, inasmuch as we have a request, which can be made or omitted, the instance essentially consists of a subjective right or faculty. This is the primary sense of the term instance. The instance is the equivalent of what procedural doctrine calls the right to the process.

Through translation, the term instance comes to acquire an objective connotation, related to a series or succession of acts constituting the process itself. In an objective sense, the term instance is a synonym of process or of grade of the process, because anyone who exercises the right to request (instance in the subjective sense) has the effect of the process or procedural juridical relationship (instance in the objective sense). These two senses are contemplated together in a well-known definition by Cappello: "Instantia, seu exercitium actionis, i.e. actualis prosecutio aut vindicatio iuris in iudicio, incipit a lite contestata; eaque potest vel finiri, ver interrumpi, vel suspendi."[1]

As can be noted, the main analogy is the right to the process, while only secondarily can it refer to the process itself as a series or succession of acts. Distinguishing these two meanings of the term instance is essential to understanding the provisions of the canons of this title, in which this expression is used by analogy. At times, instance is understood as the right to the process, as when the terms expiration or renunciation of the

1. F. CAPPELLO, *Summa iuris canonici*, III (Rome 1949), p. 188.

instance are used. The concepts of expiration or renunciation of the instance can only be used if the instance constitutes a right or faculty (cc. 1520–1525).

At other times, the legislator uses the term in referring to the process. For example, c. 1517 establishes that the instance begins with the summons. Similarly, the legislator mentions the various instances of the process, which are phases or stages of the trial, not to be confused with the right to the process or with the process as a whole. This analogy of the term instance is highlighted in c. 1524, which states that the plaintiff may renounce a trial at any stage or at any grade, which is the same as saying that the plaintiff may waive the instance at any instance at which the process is found.

2. *The issue as "right to the process"*

When it is stated that the instance is the "exercise of the action,"[2] two rights are implicitly distinguished.[3] On the one hand, the action as a right to concrete jurisdictional protection or as a right to a favorable judgment; and, on the other, the instance itself as a right to the jurisdictional activity or as a right to a judgment "on the merits," regardless of whether it is in favor of or against the plaintiff's claim. The distinction is extremely important for an understanding of the procedural dynamics. For example, when the ecclesiastical judge declares that there is no evidence of the nullity of the marriage requested by the plaintiff, the right to the process has been satisfied by the judicial action; the same cannot be said with respect to the action, because the tribunal has dismissed it. The instance usually concludes with a judgment on the merits, because in this way the parties' right to the process is satisfied, even if it rests on the action or right to actual protection, which will occur—for example—provided that there is a cause of nullity of marriage. In this case, the plaintiff will only have his or her right to protection satisfied—if it actually exists—when he or she actually obtains from the tribunal the declaration of nullity of the bond.

Therefore, the instance should not be confused with the action or with the claim. The claim—unlike the other two concepts—is not a right but the act of affirming the action. It should not be forgotten that we are in the sphere of procedural law, in which the judge faces "claims" or "affirmed truths" from both sides. Prejudices should be avoided in the process, that is, the judge forming his opinion regarding the litigation ahead of time. This task is postponed until the end of the process, when the judgment is pronounced. In the meanwhile, the claim prevails in the process, that is, the actions as affirmed by the plaintiff.

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2. Cf. ibid.
3. For the "right of access to the tribunals," cf. A. DE LA OLIVA-M.A. FERNÁNDEZ, *Lecciones de Derecho procesal*, I (Barcelona 1984), pp. 94–109.

3. *The absolving sentence in the issue*

Inasmuch as the action and the instance are distinct concepts, it may occur that at the natural conclusion of the process, the judge realizes that he cannot begin to judge the actionon the merits of the litigation because the necessary jurisdictional, structural, personal, or disciplinary requirements[4] have not been met. Obviously, these requirements should subsist from the initiation of the process,[5] but when their absence is noted later, the judge must pronounce a judgment in which the plaintiff is told that he or she does not enjoy the right to obtain a judgment on the merits because one of the essential requirements of the instance is lacking. In this case, the judge is declaring that there is no instance ("right to the process"); therefore, he is not pronouncing a judgment on the merits. This does not mean that the plaintiff lacks the action, but merely that the action cannot be handled in the process due to the absence of some formal requirement, related to the instance. For this reason, the action can be exercised when the procedural requirements are met. The acts of the process ("acts of the cause"), pursuant to c. 1522, may be used in a subsequent process, because they do not expire.

4. *Objective meaning of the issue*

The objective meaning of the instance is derived from its subjective or principle meaning. That relationship is not only highlighted because it refers to the initiation of the process, but also because it refers to its conclusion: the instance normally concludes with the definitive judgment (c. 1517). That is because the instance *stricto sensu* is the right to a judgment on the merits. Once the judgment on the merits is pronounced, this right has been satisfied. For this reason, in its objective sense, the instance is the series or succession of acts required for that right to be satisfied. The entire process is somewhat teleologically beset by the need to have the activity of jurisprudence respond to the truth: that is why the heart of the process is not the "instance," but the action, which will only be satisfied when the judgment is favorable.

For this reason, c. 1517 does not state that the instance ends with the final judgment but with the definitive judgment. That is because procedural law foresees the possibility that the judgment on the merits pronounced by the judge does not conform to the truth. In that case, the action is still pending, such that it is possible to initiate a new series or succession of acts, distinct from the first, which also ends with a definitive judgment or confirming decree (cf. c. 1684). Thus, it is possible to

4. Cf. M. ARROBA, *Diritto processuale canonico* (Rome 1993), p. 68.
5. Cf. ibid.

open a second—or, if applicable, a subsequent—instance, with the same judicial process remaining.

In the sphere of the matrimonial process, the concept of the instance suffers some interesting variations. On the one hand, for the declaration of nullity to be executed, it is necessary for there to be two conforming decisions. That means that the first judgment of nullity cannot absolutely be called "definitive" (which also explains other paradoxical situations that can arise in the canonical matrimonial process, such as, for instance, in the sphere of the appeal.[6] This is because "even if the plaintiff's claim is favorable, it cannot be said that the jurisdictional protection being requested is granted" (cf. c. 1684 § 1). In fact, jurisdictional protection can only be considered granted when the judgment is favorable and executable. On the other hand, judgments related to the status of persons never become an adjudged matter, which means that the concept of finality is not completely applicable to these judgments. Thus, in these matrimonial processes, there are often causes heard at more than one instance, or more than one chapter of nullity related to a same bond is heard at more than one instance (cf. c. 1683).

6. Cf. J. LLOBELL, "La necessità della doppia sentenza conforme e l'*appello automatico* ex can. 1682 costituiscono un gravame? Sul diritto di appello presso la Rota Romana," in *Ius Ecclesiae* 5 (1993), pp. 597–609.

1517 Instantiae initium fit citatione; finis autem non solum pronuntiatione sententiae definitivae, sed etiam aliis modis iure praefinitis.

The trial of the issue is initiated by the summons. It is concluded not only by the pronouncement of the definitive judgement, but also by other means determined by law.

SOURCES: c. 1732; *NSRR* 81; *SN* can. 254

CROSS-REFERENCES: cc. 1505, 1512, 1592, 1607, 1618

COMMENTARY

Joan Carreras

Canon 1732 of the *CIC*/1917 established that the instance began with the joinder of issue. On the other hand, c. 254 of the 1950 *Motu proprio De iudiciis pro Ecclesia Orientali*[1] established that the instance begins with the summons of the respondent. The *CIC* has taken the latter position, abandoning the theory that the joinder of issue initiates the instance. Paradoxically, the *CCEO* has chosen not to define when the instance begins. However, c. 1194 *CCEO* attributes the function of determining the beginning of the instance to the summons. The will of the legislator is obvious, in *CCEO*: to dispense with a canon equivalent to c. 1517 of the *CIC*.

The position taken by the *CCEO* is preferable, because it is not positive law that determines when the instance begins; this task is more of a doctrinal nature. In fact, if the legislator comes out in favor of a point in the proceedings such as the summons, then there is a risk of incurring prescriptions that are barely acceptable from the technical-procedural point of view. If the instance is considered an equivalent of the right to the process, it is evident that the instance has already begun before the summons of the respondent. Canon 1505 provides that the sole judge or the presiding judge of the collegial tribunal must admit or reject the petition submitted by the plaintiff as soon as possible. The petition may only be rejected in the cases provided by § 2 of the same canon, which means that the plaintiff has the right to have the petition admitted. Obviously, the plaintiff's right to have the petition admitted is not a right outside of the instance, but is a part thereof. Precisely because the plaintiff has the right to the process, the judge has to admit the petition. However, none of this

1. *AAS* 42 (1950), p. 59.

would be so if it were true that the instance begins with the summons of the respondent.

In addition, when the concept of the instance is taken in the objective sense, it seems appropriate for the instance to begin before the summons of the respondent. Otherwise, it would be absurd to maintain that the petition and the acceptance, or the rejection of the petition, are not procedural acts, because they are outside of the instance. If the instance is taken as an equivalent of the process, then it is advisable to consider the petition as well as the decree by which it is admitted or rejected to be included in the process. Moreover, this being the case, that is incompatible with the statement that the instance begins with the summons.

It should be acknowledged that the first statement of c.1517 is inaccurate, because it is not very technical. One could wonder why it is so emphatically stated that the instance begins with the summons. The reason can be found in the fact that part of the effects characteristic of the litispendence have been concentrated and linked by the legislator to the act of the summons.

Canon 1512 establishes: "once a summons has been lawfully communicated, or the parties have presented themselves before a judge to pursue the case: 1° the matter ceases to be a neutral one; 2° the case becomes that of the judge or of the tribunal, in other respects lawfully competent, before whom the action was brought; 3° the jurisdiction of a delegated judge is confirmed so that it does not lapse on the expiry of the authority of the person who delegated; 4° prescription is interrupted, unless otherwise provided; 5° the suit begins to be a pending one, and therefore the principle immediately applies 'while a suit is pending, no new element is to be introduced.'" The fact that so many important procedural and substantive effects are linked to the summons is significant. Moreover, the procedural juridical relationship cannot be considered completely established until the summons takes place and, with it, the main effects of the *litispendence*. However, technically speaking, that does not mean that the instance begins with the summons.

Canon 1517 also indicates that the instance concludes "not only by the pronouncement of the definitive judgment, but also by other means determined by law." Here, the term instance is equivalent to grade of the process, which normally concludes with the definitive judgment. Interlocutory judgments do not end the instance, but in some cases can involve this effect. Thus, for example, c. 1618 establishes that "an interlocutory judgment or a decree has the force of a definitive judgment if, in respect of at least one of the parties, it prevents the trial, or brings to an end the trial itself or any instance of it."

Other ways of concluding the instance are established by the legislator in cc. 1520–1523 (abatement) and 1524–1525 (renunciation of the instance). Although the legislator does not refer to it, *a fortiori* the

renunciation of the action also ends the instance. The renunciation of the action necessarily includes the renunciation of the instance; however, a person who renounces the instance can still exercise the action in the future. Other means of concluding the process already initiated are conciliation, mediation and arbitration (cc. 1713 et seq.).

There are circumstances that can directly affect the progress of the process, but which do not necessarily cause its end, but do cause its interruption or suspension (cc. 1518–1519).

1518 **Si pars litigans moriatur aut statum mutet aut cesset ab officio cuius ratione agit:**

1° causa nondum conclusa, instantia suspenditur donec heres defuncti aut successor aut is, cuius intersit, litem resumat;

2° causa conclusa, iudex procedere debet ad ulteriora, citato procuratore, si adsit, secus defuncti herede vel successore.

If a litigant dies, undergoes a change in status, or ceases from the office in virtue of which he or she was acting:

1° if the case has not yet been concluded, the trial is suspended until the heir of the deceased, or the successor, or a person whose interest is involved, resumes the suit;

2° if the case has been concluded, the judge must proceed to the remaining steps of the case, having first summoned the procurator, if there is one, or else the heir of the deceased or the successor.

SOURCES: c. 1733; *NSRR* 79; *PrM* 222 § 1

1519 **§ 1. Si a munere cesset tutor vel curator vel procurator, qui sit ad normam can. 1481 §§ 1 et 3 necessarius, instantia interim suspenditur.**

§ 2. Alium autem tutorem vel curatorem iudex quam primum constituat; procuratorem vero ad litem constituere potest, si pars neglexerit intra brevem terminum ab ipso iudice statutum.

§ 1. If the guardian or the curator or the procurator required in accordance with Can. 1481 §§ 1 and 3, ceases from office, the trial is suspended for the time being.

§ 2. However, the judge is to appoint another guardian or curator as soon as possible. He can appoint a procurator *ad litem* if the party has neglected to do so within the brief time prescribed by the judge himself.

SOURCES: § 1: c. 1735; *NSRR* 80

CROSS-REFERENCES: cc. 1481, 1599, 1674, 1675 § 2

COMMENTARY

Joan Carreras

1. *Legal motives for which an interruption to the process is brought about*

The right to juridical protection or action has a life that is independent of that of the parties. Therefore, the death of a litigant necessarily affects the progress of the process but does not cause its conclusion, because other persons can succeed the deceased and continue the initiative of the interrupted process. The physical person dies, but the action survives, albeit with another holder. Moreover, the legislator extends the effect caused by the death of a litigant to comparable circumstances:

a) *A change in the status of one of the litigants.* This involves a situation in which the capacity to be in trial is altered. For example, when a minor reaches age eighteen (c. 97), the instance may be interrupted to consider the advisability of continuing the cause initiated by his or her guardian.

b) With respect to juridical or moral persons, the same effect takes place when the litigant ceases in the position or office by virtue of which he or she acted in the process. This effect would not occur when the party is the juridical person on behalf of which the person who ceases from office is acting. On the other hand, interruption would occur when the legal representative of the party acts on his or her own behalf. In this case, cessation in office would interrupt the instance, which the juridical person represented in the process may resume.

c) Canon 1519 § 1 extends the concept of "interruption" when those who cease in their office are the representatives of the parties to the process: guardians, curators or the procurator referred to in c. 1481 §§ 1 and 3. This would only take place when procedural law binds the actions of these representatives, not when the person who ceases in office is a procurator that the party to the process has freely chosen, without being obligated to do so. For the same reason, "these norms also apply for the defender of the bond and the promoter of justice if they must intervene."[1] Nevertheless, "in causes in which the party can act on his or her own behalf, even if there is no formal interruption, one cannot proceed *ad ulteriora* before the party makes known his or her intent to defend his or herself or submits the appointment of a new procurator, in order to not be deprived of the right to a hearing."[2]

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1. Cf. V. PALESTRO, "L'istanza della lite (can. 1517–1525)," in *Il processo matrimoniale canonico*, 2nd ed. (Vatican City 1994), p. 545.
2. Ibid., p. 550.

Although cases in which there is an interruption of the instance are limited,[3] doctrine holds that extinction of the juridical person is comparable to the death of the litigant; therefore, it can be subsumed among the phenomena of c. 1518 (cf. c. 1480 § 2).

2. *Can one distinguish between "interruption" and "suspension" of the issue?*

Before the promulgation of the *CIC*, c. 1733 *CIC*/1917, as well as canonical and civil procedural doctrine, distinguished "interruption" from "suspension." Canon 1518 has eliminated this distinction by substituting *instantia interrumpitur* (c. 1733 *CIC*/1917) for *instantia suspenditur* (this latter phrase has gone to c. 1199 *CCEO*). Canonical doctrine has critically assessed this terminological change,[4] which only can be attributed—according to the well-founded conclusion reached by D'Ostilio—to a mistake or "disattenzione dell'Attuario del *Coetus consultorum*."[5]

In fact, cc. 1518 and 1519 establish the concept of interruption of the instance, although that word is not used *expressis verbis*. In the phenomena examined in the preceding section, the instance is interrupted *ipso iure*, which means that the possible decree of the judge is limited to a declaring that an interruption has occurred. However, there are situations that produce effects similar to interruption of the instance. These effects are referred to as "suspension" of the instance. It is useful to retain this terminology and continue to distinguish the concepts of interruption and suspension of the instance.[6]

3. *Interruption of the issue and its effects*

The establishment of interruption of the instance is to protect the interests of the litigants and guarantee the existence of the dispute, as well as effective technical representation of the parties.[7]

In the cases provided in c. 1518 (death, change of status, cessation in office), the instance can only be interrupted when these events occur before the conclusion of the cause. As soon as the judge receives notice of the fact that causes the interruption, he must declare the instance interrupted by decree, and "he will so advise the parties, the promoter of justice

3. Cf. ibid., p. 545.
4. Cf. V. Palestro, "L'istanza della lite...," cit., pp. 542–544.
5. F. D'Ostilio, "Sospensione o interruzione?," in *Apollinaris* 65 (1992), pp. 217–236.
6. The similarities and differences between both figures are well-defined: ibid., pp. 224–227.
7. Cf. ibid., p. 218.

or the defender of the bond if they intervene, the advocate of the deceased, if the deceased is constituted in the trial, or his or her heirs —if they are known— in order that they can exercise their rights."[8] However, if these acts occur after the cause has concluded, then "the judge must proceed to the remaining steps of the case, having first summoned the procurator, if there is one, or else the heir or the successor of the deceased" (c. 1518,2°). This is because, once the cause has concluded, everything is ready for judgment to be pronounced and it is inadvisable to delay it.

The main effects of interruption—which are common to suspension of the instance—are a) "an inability to perform juridical acts intended to alter the procedural situation that had been created at the time of the interruption or suspension; b) the interruption of the pending procedural terms."[9] The acts performed by the parties, once the instance is interrupted, are relatively null (they can be remedied). The same is the case for any act of the judge that is not a declaration of the interruption of the instance.

4. *Legal approval to renew the interrupted issue*

Canon 1518,1° distinguishes three types of persons who can ask the judge to resume the instance:

a) *The heirs of the deceased.* If more than one person is declared an heir of the deceased litigant, either pursuant to specific title or general title, an incidental matter may arise.[10]

b) *The successor.*

c) *Any person who has a lawful interest.* This is an innovation of the new *CIC*, even if it was already admitted without controversy by traditional doctrine and canonical practice, also concerning matrimonial causes.[11]

Canon 1675 § 2 establishes that "if a spouse should die during the course of a case, can. 1518 is to be observed." Therefore, while the initiative to file a matrimonial case devolves mainly upon the spouses (c. 1674), the provisions of cc. 1518 and 1675 § 2 expand the *ius impugnandi* without contradicting the previous norm. In fact, once the spouse has taken the initiative to challenge the marriage, other persons can substitute for him or her if the instance is interrupted by death.[12] If the spouse dies after

8. V. PALESTRO, "L'istanza della lite...," cit., p. 545.
9. F. D'OSTILIO, "Sospensione o interruzione?," cit., p. 225.
10. Cf. V. PALESTRO, "L'istanza della lite...," cit., p. 546.
11. Cf. ibid.; *coram* SABATTANI, July 14, 1961, in *SRR Dec*, 53 (1961), p. 379, no. 21; Signatura, *coram* SABATTANI, October 16, 1972, in *Periodica* 72 (1983), p. 118.
12. Cf. V. PALESTRO, "L'istanza della lite...," cit., pp. 548–549.

the conclusion of the cause or after the definitive judgment *pro nullitate* is pronounced, several problems arise, such as knowing if the marriage can be considered null for all purposes or whether the cause must be resumed through the "automatic appeal" (c. 1682 § 1). The previous legislation (especially *Provida Mater* 222) as well as canonical doctrine and jurisprudence[13] may be most useful in solving these problems.

A last problem related to the resumption of the instance is to know to what extent the "interrupted instance" is subject to the principle of abatement of c. 1520. D'Ostilio has affirmed that "the peremptory term for resumption is six months, counted from the occurrence of the juridical fact by which 'the interruption' is declared by the judge, inasmuch as this ruling is of a declarative nature."[14] That would be justified because "the reasons that prevent prolonged procedural inactivity, during the *litispendence*, are the same reasons that must prevent prolonged inactivity by those who have any interest in the resumption of the interrupted instance: the principle *vigilantibus iura succurrunt* must be applied to the original parties of the procedural relationship as well as to their successors."[15]

5. *Suspension of the issue*

The concept of suspension may be contrasted with interruption of the instance. This term indicates the situation of the main process in which some fact —regardless of the status of the parties or their procurators in the process[16]—prevents the process from following its normal course, such that the calculation of the procedural periods and terms is suspended[17]:

Three types of suspension of the instance are distinguished[18]:

a) *Necessary*: this is suspension expressly provided by law, which occurs when an incidental matters arises and must be resolved before the final decision.

b) *Agreed upon*: the parties by agreement can request that the judge suspend the instance, because facts of a different nature call for it.

c) *Optional*: the judge may optionally evaluate, by decree, the advisability of suspending the instance.

13. Cf. J. TORRES, *Processus matrimonialis* (Neapoli 1956), pp. 472–490; *coram* SABATTANI, July 14, 1961, cit., pp. 376–379.
14. F. D'OSTILIO, "Sospensione o interruzione?," cit., p. 220.
15. Ibid., p. 221.
16. Cf. ibid., p. 222.
17. Cf. F. D'OSTILIO, "Sospensione o interruzione?," cit., p. 223.
18. Cf. F. D'OSTILIO, "Sospensione o interruzione?," cit., p. 223.

1520 Si nullus actus processualis, nullo obstante impedimento, ponatur a partibus per sex menses, instantia perimitur. Lex particularis alios peremptionis terminos statuere potest.

If over a period of six months, the parties perform no procedural act, and they have not been impeded from doing so, the trial is abated. Particular law may prescribe other time limits for abatement.

SOURCES: c. 1736; *NSRR* 81

CROSS REFERENCES: cc. 203, 1452, 1618

COMMENTARY

Joan Carreras

Abatement of the issue. Notion and requirements

Unjustified inactivity by the parties is interpreted, according to the canon, as a tacit renunciation of the instance.[1] This norm, relatively recent in canonical procedural law,[2] is due to reasons of public order, to which the canonical system is increasingly sensitive. The best way to prevent the process from dragging out is to establish a period of abatement of the instance.[3]

a) For the instance to abate, it is necessary that no procedural act be performed. Although some writers believe that null or invalid procedural acts interrupt the term of abatement,[4] it is more logical that a null act can demonstrate that the party's will is incompatible with an "implicit waiver of the instance," which is essentially what abatement consists of.[5]

b) Only the inactivity of the parties can cause abatement of the instance. The judge's inactivity cannot cause abatement of the instance, since the instance is a right of the parties. Consequently, c. 1520 links this juridical effect exclusively to the parties' inactivity.

1. Cf. V. PALESTRO, "L'istanza della lite (can. 1517–1525)," in *Il processo matrimoniale canonico*, 2nd ed. (Vatican City 1994), p. 552.
2. For a good historical overview of the civil and canonical norms, one can consult M. LEGA, *Commentarius in iudicia ecclesiastica* (Rome 1939), pp. 580–583.
3. Cf. F. D'OSTILIO, *I processi canonici. Loro giusta durata* (Rome 1989), *passim*.
4. Cf. M. LEGA, *Comentarius in iudicia ecclesiastica* (Rome 1939), p. 584.
5. Cf. V. PALESTRO, "L'istanza...," cit., p. 554.

c) *Provided there is no impediment.* Impediments to performing a procedural act can be "legal"—that is, an interruption or suspension of the process: cf. cc. 1518–1519—as well as "factual," which can be of widely varied nature—from a public disaster to an illness of either of the parties—and must be considered by the judge in his discretion.[6] If the judge finds an impediment to be non-existent, inestimable or insufficient and declares abatement of the instance, "the party has the right to take recourse to the College and also, if applicable, to the higher tribunal, inasmuch as it is a decision that "ends the trial or an instance thereof, at least with regard to one of the parties to the matter (can. 1618)."[7]

d) *For six months.* The legislator has chosen an appropriate period, if one takes into account the effectiveness of existing means of communication. The period of abatement, unlike the previous legislation, is common to the first instance and the second or subsequent instances. The term is calculated from the last procedural act, which must be considered the *dies a quo.* For the calculation of the term, the criterion established in c. 203 is used: "§ 1. The first day is not to be counted in the total, unless its beginning coincides with the beginning of the day, or unless the law expressly provides otherwise. § 2. Unless the contrary is prescribed, the final day is to be reckoned within the total; if the total time is one or more months, one or more years, one or more weeks, it finishes on completion of the last day bearing the same number or, if the month does not have the same number, on the completion of the last day of that month."

6. Cf. ibid., p. 555.
7. Ibid.

1521 Peremptio obtinet ipso iure et adversus omnes, minores quoque aliosve minoribus aequiparatos, atque etiam ex officio declarari debet, salvo iure petendi indemnitatem adversus tutores, curatores, administratores, procuratores, qui culpa se caruisse non probaverint.

Abatement takes effect by virtue of the law itself, and it is effective against everyone, even minors and those equivalent to minors; moreover, it must be declared even ex officio. This, however, is without prejudice to the right to claim compensation against those guardians, curators, administrators and procurators who have not proved that they were without fault.

SOURCES: c. 1737; *NSRR* 82

CROSS-REFERENCES: c. 1492

COMMENTARY

Joan Carreras

Characteristics of the abatement of the issue

Canon 1521 provides two characteristics of abatement of the issue:

a) "Abatement takes effect by virtue of the law itself ..."—that is, *ipso iure*—when the term lapses, if there have been no causes impeding the parties' activity. Once the term of abatement lapses, the judge may declare ex officio that the instance has concluded.

b) "...against everyone." While prescription usually operates in a trial to the extent that the party favored by it exercises the respective exception (c. 1492 § 2), the public interest of abatement implies its operation *ope legis*. Therefore, the judge is obligated to deem the instance concluded if six months pass and there are no impediments justifying the parties' inactivity.

This effect is particularly serious when the material parties can suffer damage from the procedural inactivity of their legal representatives, such as in the case of minors or juridical persons. Abatement also affects them, even if they are not directly responsible for the lack of procedural diligence. Canon 1521 indicates that it is without prejudice to "the right (of minors, juridical persons, etc.) to claim compensation against those

guardians, curators, administrators and procurators who have not proved that they were without fault."

On the other hand, the conclusion of the instance through abatement is equivalent to a *judgment of absolution of the instance; therefore, it does* not pre-judge the content of the action, which still may be exercised in another judicial forum.

1522 **Peremptio exstinguit acta processus, non vero acta causae; immo haec vim habere possunt etiam in alia instantia, dummodo causa inter easdem personas et super eadem re intercedat; sed ad extraneos quod attinet, non aliam vim obtinent nisi documentorum.**

Abatement extinguishes the procedural acts, but not the acts of the case. The acts of the case may be employed in another trial, provided the case is between the same persons and about the same matter. As far as those outside the case are concerned, however, these acts have no standing other than as documents.

SOURCES: c. 1738

1523 **Perempti iudicii expensas, quas quisque ex litigantibus fecerit, ipse ferat.**

When a trial has been abated, the litigants are to bear the expenses which each has incurred.

SOURCES: c. 1739

CROSS REFERENCES: cc. 1472, 1633, 1635, 1641,3°, 1643, 1645–1648

COMMENTARY

Joan Carreras

Effects of the abatement of the issue

The distinction between the right to the process and the action is important to distinguish the different treatment in c. 1522 given to acts of the process and acts of the cause. Abatement "extinguishes the procedural acts," which are understood to be those related to the "procedure" (c. 1472 § 1), not the action debated therein: the petition and the answer to the petition, the summons, the notification, etc. Therefore, these acts have an efficacy limited to the process in which they have been performed. If that process concludes due to abatement, those procedural acts are extinguished with it.

On the other hand, the acts of the cause—which refer to the "merits of the case" (c. 1472 § 1)—are not extinguished and can be effective in another instance or process. Abatement does not extinguish the action; therefore, the acts of the cause can be fully effective in another process in which the same action is presented between the same parties. In cases in which the actions exercised are not the same, the acts of the cause of the first process may have a documentary value in the second: for example, documents, witnesses' statements, expert reports, interlocutory judgments, etc.

Depending on whether or not the process is related to the status of persons, and the grade of trial in which abatement takes place, the effects can be different:

a) Although the action is not extinguished by abatement of the instance, when the instance is "in the appeal grade" (c. 1641,3°), the judgment becomes an adjudged matter, with the resulting effect of extinguishment of the action. Only the plaintiff will eventually have the option of full reinstatement (cc. 1645–1648).

b) In matrimonial causes, if abatement takes place before the definitive judgment of the first instance, the cause must be resumed before the currently competent judge, not the judge who heard the instance that concluded by abatement.[1]

c) "The appeal is considered to be abandoned if the time-limits for an appeal before either the originating judge or the appeal judge have expired without action being taken" (c. 1635). If abatement occurs at the appeal grade and it is a matrimonial cause, which never becomes an adjudged matter (c. 1643), resumption of the instance must be requested before the appeal judge, except when the appeal is lodged outside of the time period, in which case "the appeal is to be pursued before the judge *a quo*, and he will be asked to forward the acts to the competent appeals tribunal"[2] (c. 1633).

Lastly, c. 1523 establishes that "when a trial has been abated, the litigants are to bear the expenses which each has incurred."

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1. Cf. the reply of the CPI, May 17, 1986, in *AAS* 78 (1986), p. 1324; V. PALESTRO, "L'istanza della lite (can. 1517–1525)," in *Il processo matrimoniale canonico*, 2nd ed. (Vatican City 1994), p. 557, note 41; J. LLOBELL, "Acción, pretensión y fuero del actor en los procesos declarativos de la nulidad matrimonial," in *Ius Canonicum* 27 (1987), pp. 639–642; Signatura, *Declaratio de foro competenti in causa nullitatis matrimonii, post sententiam negativam in prima instantia latam*, June 3, 1989, in *AAS* 81 (1989), pp. 988–990.
2. V. PALESTRO, "L'istanza...," cit., p. 558; J. LLOBELL, "Centralizzazione normativa processuale e modifica dei titoli di competenza nelle cause di nullità matrimoniale," in *Ius Ecclesiae* 3 (1991), pp. 454–459.

1524 **§ 1. In quolibet statu et gradu iudicii potest actor instantiae renuntiare; item tum actor tum pars conventa possunt processus actis renuntiare sive omnibus sive nonnullis tantum.**

§ 2. Tutores et administratores personarum iuridicarum, ut renuntiare possint instantiae, egent consilio vel consensu eorum, quorum concursus requiritur ad ponendos actus, qui ordinariae administrationis fines excedunt.

§ 3. Renuntiatio, ut valeat, peragenda est scripto, eademque a parte vel ab eius procuratore, speciali tamen mandato munito, debet subscribi, cum altera parte communicari, ab eaque acceptari vel saltem non impugnari, et a iudice admitti.

§ 1. The plaintiff may renounce a trial at any stage or at any grade. Likewise, both the plaintiff and the respondent may renounce the procedural acts either in whole or only in pt.

§ 2. To renounce the trial of an issue, guardians and administrators of juridical persons must have the advice or the consent of those whose agreement is required to conduct business which exceed the limits of ordinary administration.

§ 3. To be valid, a renunciation must be in writing, and must be signed either by the party, or by a procurator who has been given a special mandate for this purpose; it must be communicated to the other party, who must accept or at least not oppose it; and it must be admitted by the judge.

SOURCES: § 1: c. 1740 § 1
§ 2: c. 1527 § 1
§ 3: c. 1740 § 2; *NSRR* 87–90

1525 **Renuntiatio a iudice admissa, pro actis quibus renuntiatum est, eosdem parit effectus ac peremptio instantiae, itemque obligat renuntiantem ad solvendas expensas actorum, quibus renuntiatum fuit.**

Once a renunciation has been admitted by the judge, it has the same effects for the acts that have been renounced as has an abatement of the trial. Likewise, it obliges the person renouncing to pay the expenses of those acts that have been renounced.

SOURCES: c. 1741; *NSRR* 91

CROSS REFERENCES: cc. 1485, 1594, 1641,3°, 1724

COMMENTARY

Joan Carreras

1. *Renunciation of the issue*

In these canons, the legislator is referring only to renunciation of the instance, not renunciation of the action. Therefore, after having withdrawn, the plaintiff may present an action again in a future process, if prescription has not attached to the action. Canon 1524 § 1 distinguishes between renunciation of the instance and total or partial renunciation of the procedural acts.

2. *Desistence of the actor*

This concept only relates to the plaintiff, since the plaintiff is the *dominus litis.* The plaintiff can withdraw at any stage or grade of the trial. However, depending on the point at which it is done, freedom to renounce the instance is not absolute. Should the plaintiff withdraw prior to the summons of the respondent, the judge must accept it, concluding the process or—depending on one's point of view—declaring that it has not begun (see commentary on c. 1517; Art. 90 *NSRR*). On the other hand, if the judge has already summoned the respondent, the juridical-procedural relationship is fully established and the respondent has a right to a judgment on the merits. For this reason, for the withdrawal to operate, it is necessary for the respondent to accept it, at least implicitly.

In cases of voluntary co-plaintiffs, each is free to renounce the instance. When joint litigation is necessary, the renunciation will only be valid when carried out jointly by all the litigants, since their presence is necessary throughout the process for the pronouncement of a judgment on the merits, which affects all of them.

Even if the renunciation of the instance leaves the action intact, it is a dispositive act affecting the juridical asset that is the object of the dispute. Therefore, the legislator provides guarantees in cases in which the renunciation is not given directly by the party to the process, but by a representative. Paragraph 2 of c. 1524 establishes that "to renounce the trial of an issue, guardians and administrators of juridical persons must have

the advice or consent of those whose agreement is required to conduct business which exceeds the limits of ordinary administration." In turn, both c. 1485 and c. 1524 § 3 establish that a procurator can only validly renounce the instance if he has a special mandate. In penal causes, the promoter of justice can renounce the instance with the consent or mandate of the ordinary who decided to initiate the process (c. 1724).

For withdrawal to take place, it is unnecessary for there to be an express declaration of will by the plaintiff, since the legislator attributes the effect of withdrawal to the plaintiff's failure to appear at the joinder of issue after having been summoned twice (c. 1594). Therefore, there can be tacit renunciation of the instance.

Once the definitive judgment is pronounced, if the parties renounce the second instance and the judge admits the renunciation, the judgment has the authority of an adjudged matter (c. 1641,3°). This is because renunciation has the same effects as abatement and "deprives one of the right to lodge an appeal even when the fifteen days provided by the legislator as the peremptory term for lodging the appeal have not passed."[1]

3. *Renunciation of all or of some of the acts of the process*

Together with the concept of withdrawal, which constitutes a way of concluding the instance, c. 1524 also mentions renunciation of all or some of the acts of the process. When total renunciation is given by the plaintiff, it is the same as withdrawal. Therefore, references to "renunciation of all the acts" refer to renunciation by the respondent. In fact, § 1 of c. 1524 establishes that "both the plaintiff and the respondent may renounce the procedural acts either in whole or only in pt." This renunciation must be express. When it precludes a procedural act, it is not understood that the party has renounced it. Therefore, the effects established by c. 1525 do not take place. In these cases, the judge can declare, ex officio or at the instance of a party, abandonment by the non-complying party.[2] "In cases in which the negligent party wishes to assert an impediment, it devolves upon the judge to assess that request, after having heard the parties. If there is any opposition, an incidental matter arises which must be handled according to normal procedure."[3]

On the other hand, the advice or consent spoken of in § 2 of c. 1524, for abandonment by guardians and the administrators of juridical persons, is not required for partial or total renunciation by the respondent. By

1. V. PALESTRO, "L'istanza della lite (can. 1517–1525)," in *Il processo matrimoniale canonico*, 2nd ed. (Vatican City 1994), p. 559.
2. Cf. ibid., p. 560.
3. Ibid.

contrast, c. 1485 also requires a special mandate for the procurator of the party to validly renounce a procedural act.

4. *Conditions for the validity and the efficacy of the renunciation*

For the renunciation to be valid, according to c. 1524 § 3, the following requirements must be met:

a) "It must be in writing and signed by the renouncing party." If the procurator is renouncing, he will sign the renunciation, provided he has a special mandate.

b) "The other party must be notified." The promoter of justice and the defender of the bond must also be notified, and reasonable time must be given for the parties to respond. If the other party does not challenge the renunciation, the judge can interpret this silence as tacit acceptance of the renunciation.

In cases of renunciation of the action by the plaintiff, the other parties to the process will also be informed. However, this is not a requirement for validity but a unilateral act that does not need to be accepted by the other party.

c) Lastly, the judge must formally issue a decree of admission, which must be notified to all parties to the matter. This is not only a requirement for validity, but also for full effect. Canon 1525 provides that "the renunciation admitted by the judge has on the renounced acts the same effects as abatement of the instance" (cc. 1520–1523). However, unlike abatement of the instance, when it is a voluntary renunciation, c. 1525 forces "the renouncing party to cover the costs of the acts he or she has renounced." These costs include the other party's attorney fees.

TITULUS IV
De probationibus

TITLE IV
Proofs

INTRODUCTION

Jean-Pierre Schouppe

1. *Notion*

This title, the equivalent of title X of the *CIC*/1917, includes provisions regulating the description, presentation, admission, and assessment of proofs proposed to the judge in order to achieve moral certainty. This moral certainty cannot be reached by the judge other than through what is alleged and proven (c. 1608 § 2), excluding all private information. Therefore, proof is intended for the judge, not the opposing party, but that does not prevent the opposing party from having the right to know, in principle, the elements of proof brought against it, in order to prepare a defense.

Moral certainty is not absolute certainty, comparable to physical or metaphysical certainty. It will take into account laws of ethics and logic that govern human conduct. However, it involves more than mere probability or subjective conviction, since it requires the absence of any reasonable and objective fear of being mistaken.[1] While the judge is the recipient of the evidence, he also is its vehicle, decreeing ex officio certain means of instruction (for example, a supplemental proof) to avoid a gravely unjust judgment. In causes concerning the public good, particularly in matrimonial causes, he is obligated to complete the proofs (cf. c. 1452).

What exactly is proof? Like the *CIC*/1917, this Code does not define proof. Traditional doctrine cites, with some variations, the classic formula *rei dubiae et controversae per legitima argumenta iudici facta ostensio.*[2] In its broadest definition, to prove means to demonstrate something in doubt. In the process, proof is the demonstration offered to the judge or

1. Cf. c. 1608 § 1 and the decisive allocution of PIUS XII to the SRR, October 1, 1942, in *AAS* 34 (1942), pp. 338–343.
2. Cf., among others, A. VERMEERSCH-J. CREUSEN, *Epitome Iuris Canonici*, III (Mechlin-Rome 1936), p. 74.

tribunal, through the means established by law, of the fact or statement constituting the object of the litigation.[3] It is the actions channeled towards that demonstration, as well as the result of the evidentiary phase, or the legally recognized means for achieving that objective.

With respect to the probative force of the means of proof, current norms have stressed the system of free or moral proof (also called the *system of intimate conviction*), a tendency present while the *CIC*/1917 was in force. This is contrasted with the system *of legal proofs*. In the latter, it devolves upon the legislator, not the judge, to assess the respective value of each means of proof. The legislator establishes a hierarchy among proofs, rejects certain procedures, and orders the judge to take as facts established by certain means of proof.[4] Thus, for example, two conforming witnesses presumably constitute complete proof.

The free assessment of proofs, predominant in current canon law, reinforces the role and responsibility of the judge, who, within the limits established by law, assesses the value of the proofs presented by the litigants. It also allows this system to get closer to the judicial truth. Thus, using the example of two witnesses, the judge must examine the credibility of the witnesses, compare their statements (particularly with those of the opposing party) and see if they are confirmed by other items of proof (cf. c. 1572).

The broad power of assessment granted to the judge is limited by specific legal provisions, which determine the efficacy of certain proofs. For instance, this occurs in the scope that can be given to the judicial confession according to the nature of the cause,[5] as set forth in c. 1608 § 3: "The judge must conscientiously weight the proofs with due regard for the provisions of law about the efficacy of certain proofs." The preparatory works discussed this provision: was it necessary to continue making an express reference to legal proofs, since their role had been considerably reduced from that of the *CIC*/1917? One consultor believed that the clause limiting the judge's power of assessment could be eliminated (*nisi lex aliquid expresse statuat de efficacia alicuius probationis*) but feared that this would risk granting too many concessions to the judge's discretionary power. This objection, raised by another consultor, was followed by a suggestion that received approval from all the other consultors: replacement of the first clause with wording that would not give the impression that there are determined exceptions. Thus, the current wording was arrived at (*firmis praescriptis...*).[6]

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3. Cf. R. NAZ, "Preuve," in *Dictionnaire de Droit Canonique*, VII (Paris 1965), p. 205.
4. Cf. H.L. and J. MAZEAUD, *Leçons de droit civil. I. Introduction à l'étude du droit*, 4th ed. (by M. DE JUGLART) (Paris 1967), p. 417, no. 388.
5. Cf. c. 1536. Other canons on the legal proof: 1522; 1526 § 2; 1535–1538; 1541–1544; 1550; 1573; 1585; 1679; 1680; 1702.
6. Cf. *Comm.* 11 (1979), p. 139.

2. *Importance*

Proof is an essential element of the process, determining its result and efficacy. It is rightly described as the "heart" of the process.[7] According to a famous juridical axiom, *allegare nihil et allegatum non probari paria sunt*; the same idea is found in the expression *idem est non esse aut non probari*. The importance of proof and of its administration is such that canonical procedure as a whole has been conceived as a function of proof:

a) Beginning with the *petition*, at least in general terms, the facts and proofs on which the petitioner is basing his or her claims are indicated (c. 1504, 2°).

b) In causes of the nullity of marriage, the *CIC* expressly provided that the *competent forum* can be determined by the criterion of the easiest examination of the evidence (cf. c. 1673, 4°)[8];

c) Concerning the *instruction*, two provisions are given. On the one hand, its duration is determined by the examination of the proofs. Sufficient time must be allowed for presenting and, if applicable, completing them.[9] The publication of the acts cannot take place before all the proofs are gathered, and the conclusion of the cause is decreed "when everything concerned with the production of the proofs has been completed," which includes the option offered the parties of completing the proofs even after the publication of the acts.[10] On the other hand, the judge has certain rights precisely as a function of the demand for proof. They consist of the right to: *a)* request help from another tribunal for the instruction of a cause or to serve judicial notice, usually in the form of a rogatory letter (c. 1418); *b)* act ex officio in causes concerning the public good (cf. c. 1452 § 1) and to compensate for the negligence of the parties in the presentation of proofs in order to avoid an unjust judgment (cf. c. 1452 § 2); *c)* travel outside of his territory to collect proofs (under the conditions established in c. 1469 § 2).

d) *After the conclusion of the cause*, the Code offers the option of proceeding to supplemental instruction before the end of the discussion (cf. cc. 1600, 1665). At the request of the collegiate tribunal, a supplement

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7. Cf., for example, c. STANKIEWICZ, February 25, 1982, in *Monitor Ecclesiasticus* 108 (1983), pp. 306–312.

8. Cf. also cc. 1410; 1412; 1413; 1673,4° and 1694.

9. Cf. cc. 1516; 1596 § 3; 1661 § 2 and 1677 § 4. See the sentence c. BRUNO, June 21, 1985, in *Quaderni Studio Rotale* 4 (1989), pp. 95–100. Regarding the issue, consult A. JACOBS, *Le droit de la défense dans les procès en déclaration de nullité de mariage selon la jurisprudence rotale* (unpublished thesis) (Louvain-la-Neuve 1990), in particular pp. 146–153.

10. Cf. cc. 1598–1599.

of this kind can also be ordered after the deliberation, before pronouncement of the judgment (c. 1609 § 5).

e) Even *in the appeal*, supplementary proof is allowed, within the limits established in c. 1600 (cf. cc. 1639 § 2 and 1640).

f) In causes concerning the status of persons, a *subsequent instance* can be granted, even after two conforming judgments, if new proofs or new and grave arguments can be presented[11];

g) *Full reinstatement* allows a challenge to a judgment when it is based on proofs subsequently proven false, or when documents subsequently discovered prove new facts demanding a contrary decision (cf. c. 1645).

3. *Division*

If to prove means to demonstrate a thing in doubt, it is necessary then to use the legally recognized means of demonstration. The term "proof" is often used in the sense of *means* of proof. The Code names several means: declarations of the parties (including the confession), documentary proof, testimony, experts, judicial access and inspection, and presumptions (cf. cc. 1530–1586). Nevertheless, the Code does not exclude other means of proof, even if they are not provided by law. It is enough for it to be deemed useful to solve the cause (cf. c. 1527 § 1), which devolves upon the judge to decide. Doctrine has made numerous distinctions that are commonly accepted.[12]

On the one hand, *ratione modi*, the following are distinguished:

a) *Simple* or *judicial* proof, which is established during the course of the process. This is contrasted with *extrajudicial* or *preconstituted* proof, which exists before the process. This is the case with written documents and presumptions, even if presumptions are not means of proof in the strict sense. While certain pre-constituted means are probative in themselves (an authentic document), all simple means and some pre-constituted means (a private document) must be weighed.

b) *Direct* proofs and *presumptions* or *indirect proofs*. The first make the fact in doubt known by themselves; the latter do not allow knowledge of the fact other than by induction from other known facts; and thus they are also known as *conjectural proofs*.

11. Cf. cc. 1644 § 1 and 1684 § 2.

12. Cf. R. NAZ, "Preuve," cit., pp. 205–213; F. ROBERTI, *De processibus*, II (Rome 1926), pp. 24–25, no. 324; F. DELLA ROCCA, *Istituzioni di diritto processuale canonico* (Turin 1946), pp. 207–208; M. LEGA, *Commentarius in Iudicia Ecclesiastica*, II (Rome 1950), pp. 628–632; L. DEL AMO, commentary on c. 1527, in *Pamplona Com*, p. 919.

c) *Principal* or *first* proofs (the offensive proofs) and *contrary* proofs (defensive proofs), depending on their objective.

d) *Personal* and *real* or material proofs, depending on the means by which the proof is provided. In turn, personal proofs can be divided into proofs *of the parties* and ex officio proofs, which are presented by the judge.

e) One will speak of *simple* proofs or *compound, concurrent and contradictory* proofs, depending on whether they make use of one or more means and whether they concur to convince the judge or tend to produce contrary convictions.

On the other hand, *ratione effectus*, the means of proof that have complete probative force are distinguished from those that do not. Thus, one refers to *full or complete proof* and *of semi-full or incomplete proof*. In the first case, for instance, when it is an authentic document, the judge finds the elements to form a conviction, in the second, the proof is insufficient in itself for the litigation to be decided. Even if it is ineffective in itself, incomplete proofs occasionally can be an initiation of the proof and be endowed with efficacy through a supplement to the proofs (*adminiculum*).[13] The judge will weigh the probative force of each incomplete proof, such that two semi-complete proofs do not necessarily constitute a complete proof (consider, for instance, case of two witnesses testifying to the same thing, but who are not credible, or two reliable witnesses stating the same thing without any connection between them). It is not a matter of a quantitative calculation, as is stressed regarding testimony in the adage *testes non numerantur sed ponderantur*.

4. *Innovations*

Title IV has brought about considerable progress in the administration of proofs.[14] Among the main innovations is the grouping of what was divided previously into confessions and interrogation of the parties under the heading "Declarations of the Parties" (cf. cc. 1530–1538). In this way, the confession is joined to the declarations of the parties among the means of proof, as was suggested by the *coetus* "De processibus" in the 1976 *Schema canonum*.[15]

In addition, the means of proof are now listed according to their order of importance. Therefore, according to the vote issued by the *coetus*, documentary proof comes before testimony, which has less probative

13. Cf. R. NAZ, "Preuve," cit., p. 208.
14. For an overview of the innovations concerning proof, cf. J. CORSO, "Le prove," in *Il processo matrimoniale canonico* (Vatican City 1988), pp. 223–246.
15. Cf. *Comm.* 8 (1976), p. 188, no. 27.

force.[16] Moreover, the oath of the parties has been eliminated from the list of means of proof. This deletion occurs in favor of the system of free assessment of the means of proof, in order to further the search for historical truth.

Finally, increased importance is given to legal representatives, who may be present at the examination of the parties, witnesses and experts. Except for the exceptions established by law, they may be informed of acts that have not been published, as well as documents that are submitted (cf. cc. 1559 and 1678).

16. Cf. ibid., p. 189, no. 30.

1526 **§ 1. Onus probandi incumbit ei qui asserit.**

§ 2. Non indigent probatione:
1° quae ab ipsa lege praesumuntur;
2° facta ab uno ex contendentibus asserta et ab altero admissa, nisi iure vel a iudice probatio nihilominus exigatur.

§ 1. The onus of proof rests upon the person who makes an allegation.

§ 2. The following matters do not require proof:
1° matters that are presumed by the law itself;
2° facts alleged by one of the litigants and admitted by the other, unless their proof is nevertheless required either by law or by the judge.

SOURCES: § 1: c. 1748 § 1; *PrM* 94
§ 2: c. 1747; *PrM* 93

CROSS REFERENCES: § 1: cc. 1452, 1516, 1530, 1574, 1600, 1608,
§ 2, 1°: cc. 1584–1586, 15 § 2, 21, 57 § 2, 76 § 2, 78 § 2, 97 § 2, 99, 124 § 2, 140 § 3, 159, 510 § 4, 531, 1060, 1061 § 2, 1096 § 2, 1101 § 1, 1107, 1138, 1150, 1267 § 1, 1321 § 3, 1332, 1431, 1637 § 4, 1707 § 1,
§ 2, 2°: cc. 1536, 1679.

COMMENTARY

Jean-Pierre Schouppe

This canon presents two basic issues: on whom the onus of proof falls (§ 1) and what things or facts do not need to be proven (§ 2). The order of the two issues has been reversed from the *CIC*/1917, which discussed these matters in separate canons (cc. 1747–1748). This change refers back to the 1976 *Schema canonum,* in which the sole canon discussed the onus before the object of the proof.[1]

1. Cf. *Comm.* 8 (1976), p. 188, no. 26a.

I. THE ONUS OF PROOF

From Roman law, canon law has inherited the maxim according to which *affirmanti incumbit probatio*: the onus of proof rests upon the person making a claim for justice. The respondent does not have to prove anything, if he or she is content denying the claim. Nevertheless, the respondent is not prohibited from presenting a proof in advance. This rule applies to both parties, in accordance with the principle *reus in excipiendo fit actor.*

If the respondent does not merely deny the plaintiff's claim but invokes certain facts, the respondent must assume the onus of proof regarding his or her own statements. Since it devolves upon the party making a claim, the onus of proof could also be borne by the promoter of justice, the defender of the bond (cf. c. 1434) or a third party involved in the process. If the plaintiff or respondent's claims are not proven, the judge must conclude that what is supported in the statement is not sufficiently clear (*non liquet*). The possibility of exceptions and counterclaims does not imply that the opponent's claim is automatically admitted once the judge rejects the plaintiff's claim. In this sense, in contentious processes, there is not an absolute application of the principle *actore non probante reus absolvitur,* which characterizes the penal process. On the other hand, since the *Schema canonum,* it was deemed preferable to omit the enunciation of this principle, which was still present in the *CIC*/1917 (cf. c. 1748 § 2).

The onus of proof can shift to the other party, who can try to send it back to the opponent. This reversal may be due to the presumptions established by law. In fact, in some cases, the one bearing the onus of proof can be relieved because he or she benefits from a presumption.

However, it is necessary not to lose sight of the fact that a party is never obligated to prove something that goes against his or her claim, pursuant to the Roman adage *nemo contra se edere tenetur.* The application of this rule still presents some problems; therefore, in both canon law[2] and civil law[3] there are exceptions concerning equity and the actual search for the truth. For example, concerning documentary proof, the Code retains the action *ad exhibendum,* which was in the *CIC*/1917. Therefore, when it is a matter of documents common to both parties, the judge may leave his neutral position and order the presentation of documents under the conditions established by law (cf. cc. 1545–1546). In the event of a refusal, the canonical judge cannot use coercive measures such as a sanction. Nevertheless, he can find in the refusal a reason to presume

2. Cf. M. LEGA, *Commentarius in Iudicia Ecclesiastica,* II (Rome 1950), pp. 810–817.
3. Cf. N. VERHEYDEN-JEANMART, *Droit de la preuve* (Brussels 1991), pp. 31–32. Also speaks of a "right to proof" regarding proof that the opposing party withholds and refuses to present.

that the document has unfavorable probative elements for the party who refuses to present it. With regard to the facts proven in the process, they are acquired for all the parties, regardless of their origin.

II. OBJECT OF THE PROOF

1. *That which is not necessary to be proved*

Paragraph 2 of the respective canon in the *Schema canonum* contained identical wording to that of the *CIC*/1917. No proof was required for well-known facts, what the law presumes, and statements admitted by both parties, except in cases in which the judge or law demanded the proof, for reasons of the public good.

However, a consultor requested the elimination of "well-known facts," believing that the fact something is well known does not always guarantee its veracity. Two consultors proposed other wording: *facta quae a iudice declarata sunt notoria*. It was a way of restricting the extension of the concept of well-known facts as related to the *CIC*/1917, which distinguished knowledge *de jure* from knowledge *de facto*,[4] and in this way, avoiding the difficulty claimed by the first consultor. Another consultor noted that they should not hesitate to delete the reference to well-known facts, because they are easy to prove, and the *coetus* supported this latter position.[5] Therefore, a well-known fact must be proven. It is sufficient to prove that the fact is well known, for example, by attaching to the acts the document or any other means of proof demonstrating that knowledge.

a) *Legal presumptions*

According to c. 1585, "A person with a presumption of law in his or her favor is freed from the onus of proof, which then falls on the other party." A presumption is defined by c. 1584 as "a probable conjecture about something that is uncertain." It can be established by law or by the judge. In either case, even if the Code places it among the means of proof, it is not an instrument of proof, but rather a personal conclusion,[6] a probative result that the judge can reach based on conjecture.[7] Based more on

4. Canon 1747,1° referred to c. 2197,2° and 3°, which defined notorious as: "2° Notorium notorietate iuris, post sententiam iudicis competentis quae in rem iudicatam transierit aut post confessionem delinquentis in iudicio factam ad normam can. 1750; 3° Notorium notorietate facti, si publice notum sit et in talibus adiunctis commissum, ut nulla tergiversatione celari nulloque iuris suffragio excusari possit."

5. Cf. *Comm.* 11 (1979) p. 98, c. 167.

6. Cf. J.J. GARCÍA-FAÍLDE, *Nuevo derecho procesal canónico. Estudio sistemático-analítico comparado* (Salamanca 1984), pp. 152ff. This does not prevent the jurisprudence from sometimes making an objective presumption of evidence by metonym.

an exemption from proof than on a proof, this result, far from being definitive, demands prudent verification by the judge in light of the court record as a whole.[8]

Within the framework of § 2 of c. 1526, one can merely allude to the legal presumption, which excludes the *praesumptio hominis*, what is conjectured by the judge. Unlike the *CIC*/1917, the Code has eliminated any trace of irresistible presumption: any presumption is valid barring evidence to the contrary.[9]

Because of the function of the legal presumption, the onus of proof can shift to the opposing party. The presumed fact or the basis of the presumption can be attacked with direct as well as indirect means of proof.[10] It should be noted that legal presumptions do not relieve one of the onus of proving the facts that give place to the presumption. The presumption would yield to the contrary proof that could be presented by the opposing party.

b) *Facts admitted by both parties*

In a contentious process, assuming that it does not concern a matter of the public good or deserve particular protection (so that the law or the judge prevents the exemption from the proof), the facts alleged by one party and not answered by the opposing party do not need proof. Various canons specify in this regard the application of the final clause of § 2,2°. Canon 1536 § 1 confirms that "in a private matter and where the public good is not at stake, a judicial confession of one party relieves the other parties of the onus of proof." In causes concerning the public good, § 2 does not prevent a judicial confession or statements of the parties that are not a confession from obtaining a certain probative force. What is not recognized is an effect of full proof in themselves, but a probative force that "the judge must weigh together with the other circumstances of the cause," so that full probative force is not precluded, provided that "other elements fully corroborate them." In practice, this relief from the onus of proof is precluded in all causes of declaration of nullity of marriage, which affect the public good and in those in which the risk of collusion between the parties should not be excluded (cf. c. 1679).

7. Cf. C DE DIEGO-LORA, "La tutela de los derechos en la Iglesia," in *Manual de derecho Canónico* (Pamplona 1988), p. 740.

8. Cf. A. JULLIEN, *Juges et avocats des Tribunaux de l'Église* (Rome 1970), pp. 286–290.

9. The last traces of the presumption *iuris et de iure* in the *CIC*/1917 were in c. 1904. The *coetus* decided to suppress every reference to the presumptions. Cf. *Comm.* 11 (1979) p. 127, c. 239. Regarding the presumptions according to the *CIC*/1917, see R. Naz, "Présomption," in *Dictionnaire de Droit Canonique*, VII (Paris 1965), pp. 199–203.

10. Cf. E. LABANDEIRA, *Las presunciones en derecho canónico* (Pamplona 1967), pp. 148–149.

2. *That which is susceptible to proof*

In principle, the object of the proof is the facts and juridical acts alleged by the parties to support their statements. On the other hand, it should not concern the applicable law, inasmuch as *iura novit curia*. Nevertheless, this adage has its limitations.

a) *The facts and juridical acts*

The object of the judicial proof essentially consists of the material facts and it does not extend to intents or opinions. The facts can be past, present, or even future, to the extent that they at present determine the behavior of the parties. They can be formed by all the legal means. In fact, it would be inconceivable for one to be able to demand, foreseeing possible future litigation, the prior establishment of proofs related to every fact capable of having a juridical effect.

This can be required if it is for a certain number of facts of some importance, the nature of which allows the establishment of pre-constituted proofs. Thus, for instance, the facts of birth and death are entered in the state registries.

Is it necessary to include negative facts in the object of the proof? This classic question has been answered affirmatively in doctrine[11] and jurisprudence.[12] The difficulty seems to lie in the indeterminate nature of a negative fact. A fact of this type only lends itself to indirect proof: from certain and therefore demonstrable facts, one can prove the reality of the contrary positive fact, or of certain positive facts that preclude the negative fact. Thus, if it is absolutely impossible to bring direct proof to the negative indeterminate fact that "I have not stolen," it is perfectly possible to present indirect evidence thereof: it would be enough to prove that at the time of the theft I was somewhere other than at the scene of the crime.

The juridical facts, those that in themselves or together with others have a juridical effect, constitute the ordinary object of the probative activity. Doctrine is not unanimous regarding juridical acts: are they included in the concept of juridical facts? The most widespread trends (especially in Spain and Italy) hold that juridical acts form part of the category of juridical facts, and that these facts are subdivided into juridical facts in the strict sense (such as birth) and juridical acts (such as contracts), depending on whether or not the juridical effects involve human will. Moreover, setting forth the German pandect theory of juridical matters, within juridical acts, juridical acts, in the strict sense, and juridical matters are distinguished, depending on whether the juridical conse-

11. Cf. F.X. WERNZ-P. VIDAL, *Ius Canonicum. VI. De processibus* (Rome 1927), pp. 378–379, no. 436.
12. Cf. c. WYNEN, April 9, 1952, in SRR Dec 44 (1952), p. 230, no. 7.

quences are preordained by law or depend on the will of the parties.[13] On the other hand, other authors—mainly inspired by the French—do not usually adopt the theory of the juridical matter, and consider juridical facts and juridical acts to be two distinct categories. Therefore, they would say that, in addition to juridical facts, juridical acts constitute the ordinary object of the proof. To them, juridical acts are understood to be declarations of will intended to have juridical effects, while juridical facts include every fact—excluding juridical acts—to which the law attributes some effects.[14]

Although these facts are often involuntary (birth, death, fire ...), they can also be voluntary (theft, mistreatment and injury, slander, change of domicile ...). However, even if they are voluntary, these facts do not become juridical acts, in the strict sense, because the person concerned has not intended to perform the acts because of the juridical consequences that can result therefrom.

Bilateral or unilateral juridical acts or matters, such as a contract or will, are usually subject to the system of pre-constituted proof. Usually a written document is required. Its importance in juridical relationships justifies these precautions. In any event, canon law allows proof by any legally-acceptable means, including in the case of a contract, which constitutes a special characteristic in connection with civil law, when this law requires a certain form to have effect.

b) *Exceptionally the juridical norm*

Doctrine generally admits that, although knowledge of law by the judge is assumed, the judge's knowledge is nonetheless limited. Therefore, as an exception, the following can be subject to the demand for proof: canonical norms the interpretation of which is not yet clear, a questionable or little-known custom in the area of the process, pardons or privileges, the statutes of juridical persons, or even norms of civil law when the canonical legislator refers to the state legislation of a foreign country, etc.[15]

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13. Cf. D. ESPÍN CÁNOVAS, *Derecho Civil Español*, I, 3rd ed. (Madrid 1968), pp. 368–369 and 374–375; A. TRABUCCHI, *Istituzioni di diritto civile*, 28th ed. (Padova 1986), pp. 117 and 128–129.

14. Cf. G. MARTY–P. RAYNAUD, *Droit civil. I. Introduction générale à l'étude du droit*, 2nd ed. (Paris 1972), pp. 272ff.

15. Cf. P. TORQUEBIAU, "Des procès, des délits, des peines," in *Traité de droit canonique*, IV, 2nd ed. (Paris 1954), p. 230, no. 395.

1527 **§ 1. Probationes cuiuslibet generis, quae ad causam cognoscendam utiles videantur et sint licitae, adduci possunt.**

§ 2. Si pars instet ut probatio a iudice reiecta admittatur, ipse iudex rem expeditissime definiat.

§ 1. Any type of proof that seems useful for the investigation of the case and is lawful may be submitted.

§ 2. If a party submits that a proof, which has been rejected by the judge, should be admitted, the judge is to determine the matter with maximum expedition.

SOURCES: § 1: c. 1749; *PrM* 95

CROSS REFERENCES: § 1: cc. 1530–1586, 1546 § 1
§ 2: c. 1629,5°

COMMENTARY

Jean-Pierre Schouppe

Paragraph 1 of this canon specifies the rule for admitting means of proof; and paragraph 2 discusses an incidental issue related to the judge's refusal to admit a means of proof that a party insists on using in a cause.

1. *The admission of the means of proof* (§ 1)

The admission of proofs is subject to intrinsic and extrinsic conditions. The extrinsic conditions are related to the lawful form of the means of proof and their timeliness, this latter condition being closely linked to preclusion. Note, for instance, that unlike many state systems, canon law allows testimony in all causes under the direction of the judge (cf. cc. 1290 and 1547). Canon 1527 § 1 specifies the intrinsic conditions required for the presentation[1] of any means of proof (*cuiuslibet generis*) recognized by law. The legislator has introduced two general criteria: one of a practical nature, the other of a moral nature. On the one hand, the means of proof must be useful for the instruction of the cause, which involves

1. For the substitution of the expression "admitti possunt," that figured in the *Schema canonum*, by the terms "adduci possunt," cf. *Comm.* 11 (1979), p. 98.

something more than mere relevance. It would be prejudicial to the efficacy of the procedure if the judge accepted proofs concerning facts, acts or juridical norms not closely related to what must be proven (relevance), or that, albeit related, do not seem necessary for an appraisal of the proof in that process (usefulness).[2] On the other hand, they must be lawful,[3] because of the moral principle according to which the ends do not justify the means. Not all means are allowed for establishing a judicial truth. The judge must take into account respect for the dignity of persons pursuant to natural law and its interpretation by ecclesiastical teachings. The condition of lawfulness involves and exceeds a mere prohibition on subjecting persons to torture or degrading treatment, as provided in Article 5 of the *Universal Declaration of the Rights of Man*. Thus, according to c. 1546 § 1, no one is obliged to exhibit documents that cannot be communicated without danger of harm or of violating a secret.

These two intrinsic conditions leave a wide margin for maneuvering that authorizes ecclesiastical tribunals to take advantage of scientific and technical advances, if they do not exceed these limits. Thus, for example, the examination of the "document of genetic identity" with the aid of modern means allows a determination that "this man is not the father of X," then a confirmation with quasi-certainty that "this other man is the father of X."[4] This type of expertise can prove to be quite useful in canonical causes in which, for example, paternity is the condition *sine qua non* of matrimonial consent of the spouse. Suffice it to recall the awkward situation of a certain ecclesiastical tribunal that, faced with a case of this type, was obligated to answer that it did not have the means necessary for verifying with the required moral certainty the existence of the condition. Consequently, the nullity of that marriage, which was plausible, could not be declared.[5] At present, expertise of this type allows the justice of the Church to get closer to reality and, therefore, to better serve the faithful who lawfully claim that the truth be established.

2. *An incidental question relative to the non-admittance of a means of proof* (§ 2)

This paragraph is comparable to c. 1749 of the *CIC*/1917 because it establishes a practical norm that seeks to protect the course of justice against a purely dilatory intent on the part of one of the parties. Nevertheless, it is a

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2. Cf. c. HEARD, July 28, 1938, in *SRR Dec* 30 (1946), p. 474, no. 3.
3. Cf. T. GIUSSANI, *Discrezionalità del giudice nella valutazione delle prove* (Vatican City 1977), pp. 74–75. The author speaks of three criteria: *pertinenza, rilevanza and legittimità.*
4. Cf. B. DE LANVERSIN, "Les Techniques médico-biologiques et leur rapports avec les procès canoniques," in *Dilexit iustitiam. Studia in honorem Aurelii Card. Sabattani* (Vatican City 1984), pp. 51–62.
5. Cf. C. MATTIOLI, October 29, 1964, in *SRR Dec* 56 (1964), p. 777, no. 7.

new norm. Canon 1749 ordered the judge to not admit proofs that seemed to be requested for the purpose of delaying the process. It was a matter of avoiding dilatory tactics such as the examination of witnesses who lived very far away or whose domicile seemed difficult to determine, or even an excessive number of witnesses.[6] In any event, the judge was granted the authority to decide otherwise if he found that those elements of proof were necessary to the instruction.

For its part, c. 1527 describes a particular case and imposes a specific solution: in the event that a means of proof presented by a party is rejected by the judge by decree, if the party insists that the decree be annulled, the same judge must rule in as short a period of time as possible (*expeditissime*). His decision is not subject to appeal. This should considerably speed up the handling of many processes. The desire to lessen procedural slowness is set forth in the framework of c. 1629,5°, which precludes the possibility of an appeal against "a judgment or decree in a case in which the law requires that the matter be settled with maximum expedition."

The question of whether the exclusion of an appeal is added to the nonexistence of possible recourse before the same tribunal remains to be resolved. The new rule must be compared to *Provida Mater* 95 § 2, according to which rejection of a means of proof determined by the presiding judge of the tribunal gives place to recourse to the college of the same tribunal. This norm has not been abrogated by c. 1527 § 2. It can even be applied outside of matrimonial causes, if it is a collegial tribunal.[7] What the new code provision has eliminated is the option of appealing to a higher tribunal, pursuant to *Provida Mater* 214–215, which was granted to the party opposed to the presiding judge's decision to reject a means of proof. Presently, it is impossible to appeal the decision by which the college of judges rules on the appeal.

6. This last criterion appears in the current c. 1553.

7. Cf. J.J. GARCÍA-FAÍLDE, *Nuevo derecho procesal canónico. Estudio sistemático-analítico comparado* (Salamanca 1984), pp. 97–98; I. GORDON, *Novus processus nullitatis matrimonii* (Rome 1983), p. 22, note 2.

1528 Si pars vel testis se sistere ad respondendum coram iudice renuant, licet eos audire etiam per laicum a iudice designatum aut requirere eorum declarationem coram publico notario vel quovis alio legitimo modo.

If a party or a witness refuses to testify before the judge, that person may lawfully be heard by another, even a layperson, appointed by the judge, or asked to make a declaration either before a public notary or in any other lawful manner.

SOURCES: —

CROSS-REFERENCES: cc. 1428, 1561

COMMENTARY

Jean-Pierre Schouppe

This canon is an innovation, although a similar norm did exist in the process of dissolution of the bond in favor of the faith, as established in 1973.[1] According to the preparatory work, the norm is a response to the desire to respect religious freedom in the course of judicial instruction. What is one to do when a party or witness, for religious reasons, refuses to appear before a Catholic priest? That was the issue faced by the reform commission,[2] along the lines of the 1973 procedure. Here, it is of little importance whether it is a diocesan judge or an auditor (or instructor) in the sense of c. 1428. In any situation, one should assist in the instruction and, in particular, the most thorough collection of proofs possible. This is why the *Schema canonum* granted the bishop authority to appoint a layperson to receive testimony. In the event that this is insufficient to overcome the person's reluctance, it was established that one could request a statement before a notary public, or use any other lawful means.[3] Later, it was decided to amend that canon, following the suggestion of a consultor.[4] This resulted in the present text.

1. Cf. *SCDF, Normas procesales para la realización del proceso de disolución del vínculo matrimonial en favor de la fe*, December 6, 1973, art. 5.
2. Cf. *Comm.* 7 (1976), p. 188, no. 26b.
3. Ibid.
4. "Si qua pars vel testis coram sacerdote catholico se sistere ad respondendum renuat, audiatur per laicum ab Let.iscopo designatum; quod si ne id quidem fieri possit, requiratur eius declaratio coram publico notario vel alio legitimo modo peracta" (c. 169). Cf. *Comm.* 11 (1979), pp. 98–99.

There is no express reference in the canon to any requirement that the judge must be a Catholic priest. Moreover, the designation of a layperson to hear statements is no longer attributed to the competence of the bishop, but to that of the judge. On the other hand, the replacement of the condition *si ne id quidem fieri posit* with *aut* does not seem to change the meaning of the canon. It is logical that one would not use a notary public or other legitimate means except when it is impossible to obtain statements through a layperson appointed for the purpose through canonical judicial means; nevertheless, it could be that the declarant wants a public record of his or her statements.

The role of the designated layperson is limited to the hearing of statements in accordance with the judge's instructions.[5] This role is more limited than that of the auditor, who generally receives a mandate from the judge to instruct the cause as a whole and can decide what proofs must be gathered and the means of obtaining them (cf. c. 1428).

In the light of this provision, when faced with a refusal to appear, the tribunal should follow the following steps[6]:

a) The judge shall analyze the reasons for that refusal. Is the reason based on the fact that the person must appear before a Catholic priest or an ecclesiastical tribunal, or a desire to prejudice one of the parties, or merely a question of physical difficulties, due to the distance of the tribunal or traveling expenses, etc.?

b) Once the reason is known, the judge shall act to overcome the refusal. He must demonstrate particular diligence in causes concerning the public good, favoring the means offered by judicial procedure, especially the designation of a layperson to hear the statement even outside of the see of the tribunal.

When it is impossible to obtain a statement from a party or witness through judicial means, the judge shall choose from among non-judicial means those that best ensure the honesty of the deponent's statement and the trustworthiness of the person who receives it: notary public, two witnesses, sole witness (even a layperson). As a last resort, the witness or party shall be asked for a written statement, although its authenticity must be guaranteed. In any event, the judge shall weigh what consequences may eventually result from the attitude adopted by the party or witness.

5. Canon 1561 had foreseen that the designated layperson could ask the questions that occur to him of the parties, the advocates (if present) and, of course, eventually, the promotor of justice and the defender of the bond.

6. Cf. in the same sense L. DEL AMO, commentary on c. 1528, in *Pamplona Com.*

1529 **Iudex ad probationes colligendas ne procedat ante litis contestationem nisi ob gravem causam.**

Unless there is a grave reason, the judge is not to proceed to collect the proofs before the joinder of the issue.

SOURCES: c. 1730; *PrM* 110

CROSS REFERENCES: cc. 1513, 1516, 1598 § 2, 1600

COMMENTARY

Jean-Pierre Schouppe

This canon relates to the initiation of the probative period. Since the means of proof must be directly related to the object of litigation, it is reasonable to wait to collect and present the proofs until the precise object of litigation has been established by the judge, based on the elements presented by the litigants (cf. c. 1513). Therefore, one must wait until the joinder of issue. This procedural principle dates back to the Decretals of Gregory IX and was found in c. 1730 of the *CIC*/1917 (although not under the heading of proofs).

However, if there are grave reasons, the judge may collect proofs without waiting for the joinder of issue. Similarly, by way of exception, after the publication of the acts (cf. c. 1598 § 2), and even after the conclusion of the cause (cf. c. 1600), it is still possible to present proofs, under the conditions established by law.

What are the grave reasons justifying the gathering of proofs before the joinder of issue? The former c. 1730 offered examples of situations in which diligence in collecting proofs prevailed over the obligation to wait until the joinder of issue, including contumacy and the fear that a witness could die or be absent for a long time. The current c. 1529 does not explain what "grave reason" means. However, in addition to the examples mentioned above, one may consider the case in which important proofs or *indicia* are in danger of disappearing. The search for the truth certainly justifies gathering proofs and *indicia* before it is too late.

CAPUT I
De partium declarationibus

CHAPTER I
The Declarations of the Parties

1530 **Iudex ad veritatem aptius eruendam partes interrogare semper potest, immo debet, ad instantiam partis vel ad probandum factum quod publice interest extra dubium poni.**

The judge may always question the parties in order the more effectively to elicit the truth. He must do so if requested by one of the parties, or in order to prove a fact which the public interest requires to be placed beyond doubt.

SOURCES: c. 1742 §§1 et 2

CROSS REFERENCES: cc. 1430, 1434, 1452, 1501–1516, 1691, 1696, 1721

COMMENTARY

Thomas G. Doran

1. Even a casual comparison of the *CIC* with *CIC*/1917 will immediately reveal a significant and helpful change. The new legislation places in one chapter both the material concerning their "declarations" made in judgment and the canons having to do with the "confessions" made by those same parties. Both types of "confessions"—judicial (that is, made in the presence of a competent judge) and extrajudicial (that is, made in the presence of the other party to the case or in the presence of witnesses)—are placed, together with the judicial declarations of the parties, in the same title IV of this second part of book VII under the rubric of "Proofs." This is in marked distinction to the *CIC*/1917 which dealt with the declarations of the parties in title IX (book IV, pt. 1, sec. I, cc. 1742–1746 *CIC*/1917), while title X addressed the various types of proofs in seven

chapters.[1] The altogether necessary demurrers of c. 1536 §2 do not at all detract from the fact that the new Code of Canon Law follows the plan used in *Provida Mater* (under title IX, "The Proofs" comes first chapter I, "Proofs in General," followed by chapter II, "The Depositions of the Parties," next chapter III, "Proof by Witnesses" and then the other types of proofs following in train).[2]

It is interesting to note the progression in the terminology used in describing this material. The *CIC*/1917 entitled it "De interrogantibus partibus in iudicio faciendis"; *Provida Mater* says "De partium depositione"; the current Code uses "De partium declarationibus." There is, to be sure, a certain fastidiousness about the use of "depositio"; a deposition, after all, is what a witness gives; and if a party to the case is, in a certain sense, a witness, in a larger sense he is not and cannot be. On the other hand, the circumlocution used by the *CIC*/1917 places the emphasis not on the response of the party, but on the question asked, which seems today a bit odd. The "declaratio" of the *CIC* now in force seems to avoid the bit of contradiction involved in calling a party a witness, and at the same time to underscore the fact that the party's solemn statement, which can be given under oath (cf. c. 1532), has some significant value even if, to be sure, it cannot, uncorroborated, be taken for full proof. If it is permitted that canon law have a pastoral side, here is one place where it would seem it does. It enables the interviewer of a prospective plaintiff or petitioner in a marriage case to make the point that the said plaintiff's or petitioner's statement does count for something. Particularly in matrimonial cases, it is important that persons who think they might have an argument to offer in search of a declaration of invalidity not be dismissed or discouraged out of hand. It is plain fact that not every failed marriage is an invalid one. But it is equally true that those convinced that they enjoy the freedom to marry in view of a previous invalid marriage have a right to a conscientious and thoroughgoing investigation of their claims. Their honest and forthright and conscientious declaration made to the judge may not be the end of the matter, but it might be indeed a good beginning. It would be a shame not to note this evidence in the *CIC* of a certain pastoral sensitivity.

2. Thus it is a unique status that is accorded the declarations of the parties in the course of the judicial process. Chiappetta notes that properly speaking, the declarations of the parties are not in themselves proofs.[3] They are, however, grouped with the proofs because, as this canon says, they can be used to "more closely to elicit the truth," to "reveal the truth more effectively"—which is, after all, the object of the judicial process or inquiry. Thus it is that the judge can interrogate the parties

1. Cf. J.J. GARCÍA FAÍLDE, *Nuevo Derecho procesal Canónico* (Salamanca 1984), p. 104.
2. The bilingual edition, Latin-English, of the PrM that we have used is that of M.J. DOHENY, *Practical Manual for Marriage Cases* (Milwaukee 1938).
3. L. CHIAPPETTA, *Il Codice di Diritto canonico: commentario giuridico-pastorale*, II (Naples 1988), p. 636, no. 4878.

at any time. These interrogations, especially in cases involving the invalidity of marriage, are most usefully conducted at the very beginning of the instruction of the case, after the formal introduction of the case (cc. 1501–1512), and the joinder of the issue (cc. 1513–1516), when the actual gathering of information commences. However, the import of the canon is that the judge may do this, indeed may repeat it, at any time during the instructional phase of the trial,[4] whenever he determines that such a questioning would better get at the truth of the matter.[5]

As the second clause of the canon makes clear, there are circumstances in which the judge must hear the parties. One such circumstance is when one or another party requests that he or she be heard in court. And of course, as "quasi-parties" to the case, the defender of the bond and the promoter of justice may request this in cases in which they are to act (cf. c. 1434). In cases which involve the public good by the expressed provision of the law (cf. cc. 1691, 1696, 1430. 1721) and in cases of private interest in which the public good is, in the estimation of the judge, put at risk, he must hear the declarations of the parties in court.

The general principle that allows the judge considerable latitude in the questioning of the parties is found in c. 1452.

4. Cf. J.J. GARCÍA FAÍLDE, *Nuevo Derecho*..., cit., pp. 104ff.
5. Cf. L. DEL AMO, commentary on c. 1530, in *Pamplona Com.*

1531 **§ 1. Pars legitime interrogata respondere debet et veritatem integre fateri.**

§ 2. Quod si respondere recusaverit, iudicis est aestimare quid ad factorum probationem exinde erui possit.

§ 1. A party who is lawfully questioned is obliged to respond and to tell the whole truth.

§ 2. If a party has refused to reply, it is for the judge to evaluate what, as far as the proof of the facts is concerned, can be deduced therefrom.

SOURCES: §1: c. 1743 §1; *PrM* 111; CPAC Rescr., 28 apr. 1970, 14
§2: c. 1743 §2; *PrM* 112; CPAC Rescr., 28 apr. 1970, 14

CROSS REFERENCES: cc. 1368, 1528, 1561, 1564, 1728 §2

COMMENTARY

Thomas G. Doran

1. The person lawfully called to make a declaration in judgment must answer questions put to him and tell the whole truth (cf. c. 1368 regarding the penalty for perjury). The ritual question put to all those giving evidence in common law courts—"Do you swear to tell the truth, the whole truth, and nothing but the truth?"—seems all embracing enough to strike down most attempts at equivocation, evasion, tergiversation or mental reservation. It should be noted that the judge or the one who legitimately takes his place in a given circumstance (cf. c. 1528) has the right to examine the party directly. Additionally the defender of the bond, the promoter of justice and the advocates who are present have the right to pose questions to the party through the judge (cf. c. 1561).

Must one respond to everything, even to the point of being forced to confess one's guilt, to testify, so to speak, against oneself? First, the judge's questions must be legitimate—that is, not dealing with matters or facts extraneous to the controversy—and correctly formulated according to the norms of c. 1564.[1]

Second, the right of non-self-incrimination—the vaunted 5th amendment privilege of United States jurisprudence—exists, to be sure, in canonical procedure, albeit in a more genteel form (cf. c. 1728 §2); for this

1. Cf. L. DEL AMO, commentary on c. 1531, in *Pamplona Com.*

reason in penal cases the accused is not obliged to confess the crime and so should not be put under oath concerning it.[2]

2. One maxim is *qui tacet, consentire videtur.* But it is the *videtur* part that is hard to come to, and it is the responsibility of the judge to determine it—in other words, to decide what significance, importance, and moment to accord to the fact that a party refused to answer, and to decide, as well, what conclusions can be drawn as pertain to the merits of the case, because there is also the maxim that *expressa nocent, non expressa non nocent.* It seems that a party's refusal to answer can, at best, be taken as an indication (*indicium probationis*) which can means different things according to the case and the circumstances. The explicit penalties for those refusing to testify and for those who, having testified are found to have been lying or worse, to have perjured themselves, have now been removed from the judge's *armentarium* (cf. c. 1742 §3 *CIC*/1917). Such violations, of course, can be punished according to the ordinary norms of the revised penal law.

2. Cf. J.A. CORIDEN-T.J. GREEN-D.E. HEINTSCHEL (Eds.), *The Code of Canon Law: A Text and Commentary* (New York 1985), p. 978a.

1532 In casibus, in quibus bonum publicum in causa est, iudex partibus iusiurandum de veritate dicenda aut saltem de veritate dictorum deferat, nisi gravis causa aliud suadeat; in aliis casibus, potest pro sua prudentia.

Unless a grave reason suggests otherwise, in cases in which the public good is at stake the judge is to administer to the parties an oath that they will tell the truth, or at least that what they have said is the truth. In other cases, it is left to the prudent discretion of the judge to determine whether an oath is to be administered.

SOURCES: c. 1744; *PrM* 96 §1, 110; *SN* can. 266

CROSS REFERENCES: c. 1728 §2

COMMENTARY

Thomas G. Doran

Father Lawrence Wrenn gives this brief note concerning the change of posture regarding oaths between the Codes: "Over the years, there has been a variety of opinions with regard to oath taking in contentious cases having a bearing on the common good. The *CIC*/1917 (c. 1744 *CIC*/1917) *required* the judge to put the party under oath. The 1976 draft of procedural law (c. 174) said that the judge should *urge the person to take an oath.* At the November 1978 meeting of the consultors there were various opinions: some consultors thought that the judge should *urge the person to tell the truth*, without any oath; some thought it should be left to the discretion of the judge; and others thought that the person should be *required* to take an oath, as in the *CIC*/1917.[1] The present canon is a compromise position, requiring the judge to put the party under oath, 'unless a serious cause persuades otherwise.'"[2]

Thus, the whole issue of oath taking has been somewhat rearranged, as in the new Code, the oath is no longer a species of proof, but a guarantee whose value depends exclusively on the moral character of the party. In cases involving the public good, the former Code spoke of the parties' taking the oath *de veritate dicenda* only, while the canon above cited speaks of the judge being required to ask them to take the oath both *de veritate*

1. Cf. *Comm.* 11 (1979), pp. 101–102.
2. J.A. CORIDEN-T.J. GREEN-D.E. HEINTSCHEL (Eds.), *The Code of Canon Law: A Text and Commentary* (New York 1985), p. 978a.

dicenda and *de veritate dictorum*, or at least the latter. This he is to do (the *deferat* of the text of the Code indicates obligation) so long as no serious consideration induces him to omit doing so. In other cases—those not involving the public good—the judge is to consult his own prudence in deciding whether or not (the Latin's text *potest* means that it is left to the judge's discretion) to propose the taking of the oath. Of course, the defendant in a criminal case does not give sworn testimony (cf. 1728 §2).

1533 Partes, promotor iustitiae et defensor vinculi possunt iudici exhibere articulos, super quibus pars interrogetur.

The parties, the promotor of justice and the defender of the bond may submit to the judge propositions upon which a party is to be questioned.

SOURCES: cc. 1745 §1, 1968, 1°; *NSRR* 93 §2, 99; *PrM* 70 §1, 1°; Signatura Resp. (Prot. 966/497/C.P.), 19 nov. 1947

CROSS REFERENCES: cc. 1528, 1531, 1561, 1564

COMMENTARY

Thomas G. Doran

This norm essentially repeats the previous legislation (c. 1745, §1 *CIC*/1917) that the parties, the promoter of justice and the defender of the bond can propose questions for interrogation of one or the other party. It is always to be noted that these questions are proposed to the judge, and not to the party directly in the session of the court. As noted earlier (at c. 1531, above) it is the judge or the one who legitimately takes his place (cf. cc. 1528, 1561) who is the interrogator, but the promoter of justice, the defender of the bond and the advocates of the parties taking part in the case have the right to present to the judge articles for use in the interrogation. These articles are to be formulated, of course, according to the norm of c. 1564.

1534 Circa partium interrogationem cum proportione serventur, quae in cann. 1548, §2, n. 1, 1552 et 1558–1565 de testibus statuuntur.

The provisions of Cann. 1548 §2 n.1, 1552 and 1558-1565 concerning witnesses are to be observed, with the appropriate modifications, in the questioning of the parties.

SOURCES: c. 1745 §2

CROSS REFERENCES: cc. 1548 §2,1°, 1552, 1558–1565

COMMENTARY

Thomas G. Doran

The reader is referred to the commentary below on the cited canons, which have to do with the regulations as to the qualifications and notification of witnesses, and the conduct of sessions for the interrogation of witnesses. These regulations are, insofar as it is possible and *mutatis mutandis*, to be followed in the obtaining of the declarations of the parties in judgment.

One ought always to be mindful of the differences involved in questioning an *interested party* as distinct from the interrogation of witnesses or third parties whose personal concerns are not involved with the question under judgment.

1535 **Assertio de aliquo facto, scripto vel ore, coram iudice competenti, ab aliqua parte circa ipsam iudicii materiam, sive sponte sive iudice interrogante, contra se peracta, est confessio iudicialis.**

A judicial confession is an assertion of fact against oneself, concerning a matter relevant to the trial, which is made by a party before a judge who is legally competent; this is so whether the assertion is made in writing or orally, whether spontaneously or in response to the judge's questioning.

SOURCES: c. 1750

CROSS REFERENCES: c. 1561

COMMENTARY

Thomas G. Doran

Distinct from the declarations of the parties are "confessions" made by the same parties. These "confessions" have probative force under certain conditions. The present canon gives a very precise legal definition, in terms similar to those used in the previous legislation (cf. c. 1750 *CIC/*1917), of the *judicial confession*; from this can be deduced the definition of the *extrajudicial confession*:

1. The subject, that is, the person making a judicial confession, must be one of the parties to the controversy under judgment, whether plaintiff/petitioner or defendant/respondent (and therefore not a procurator, advocate, witness or third party).

2. The object of the confession, that is, what is confessed, must be some fact or facts concerning the matter of the judgment itself that will aid in the process of coming to a decision.

3. The party must state the fact or facts in the presence of the judge (or his delegate or his auditor—cf. c. 1561).

4. The statement may be given orally or in writing, and may be either spontaneously made or made in response to questioning done by the judge. The notary should be especially scrupulous in the recording and attestation of these "confessions" in the judicial acts.

5. The statement must be made by the party against himself or herself—the characteristic which makes it a "confession."

It is generally admitted that such a statement made by one or other party through his or her procurator acting on a special mandate before the judge under the same conditions would have the same effects as the statement made in person by the party.[1]

1. Cf. L. CHIAPPETTA, *Il Codice di Diritto canonico: commentario giuridico-pastorale,* II (Naples 1988), p. 642, no. 4894.

1536 § 1. Confessio iudicialis unius partis, si agatur de negotio aliquo privato et in causa non sit bonum publicum, ceteras relevat ab onere probandi.

§ 2. In causis autem quae respiciunt bonum publicum, confessio iudicialis et partium declarationes, quae non sint confessiones, vim probandi habere possunt, a iudice aestimandam una cum ceteris causae adiunctis, at vis plenae probationis ipsis tribui nequit, nisi alia accedant elementa quae eas omnino corroborent.

§ 1. In a private matter and where the public good is not at stake, a judicial confession of one party relieves the other parties of the onus of proof.

§ 2. In cases which concern the public good, however, a judicial confession, and the declarations by the parties which are not confessions, can have a probative value that is to be weighed by the judge in association with the other circumstances of the case, but the force of full proof cannot be attributed to them unless there are other elements which wholly corroborate them.

SOURCES: §1: c. 1751
§2: SCHO Instr., 12 nov. 1947; SCHO Instr., 21 iun. 1951; Signatura Rescr., 10 nov. 1970, 1; Signatura Rescr., 2 ian. 1971, II, 1

CROSS REFERENCES: cc. 1530–1535

COMMENTARY

Thomas G. Doran

1. This paragraph of c. 1536 states very clearly the effects of a judicial confession in a case of a completely private character not involving the public good in any way, even indirectly. In such a case, the effect of the judicial confession of one party is to absolve the other party or parties to the case of the obligation or burden of proving their own case (*ceteras relevat ab onere probandi*). As Chiappetta makes clear, the provision of the canon absolving the other party or parties of the burden of proof does not quite say that a judicial confession by one party constitutes "full proof" in favor of the other party or parties. Even a confession against oneself and one's own interests may be false; consequently the judge still has the

obligation of ascertaining the truth: that the party confessing did so freely and responsibly, seriously, sincerely, plausibly, not having been influenced by error, faulty memory or emotional disturbance and in a manner truthful, clear and coherent, and in concordance with the rest of the facts and testimony given in evidence; that the rights renounced by the confessing party are rights of which he has legal disposition; and that the renunciation does not result in harm to third parties.[2] It is worthy of note that where the *CIC*/1917 defined the judicial confession as one made *contra se et pro adversario* (cf. c. 1750 *CIC*/1917), this canon says only *contra se peracta.*

2. Cases which concern the public good do not meet the criterion of c. 1536, §1 as regards the effects of a judicial confession. In these cases involving the public good, the judicial confession of a party, or the declarations of the parties that are not judicial confessions (discussed above at cc. 1530–1534) can constitute *part* of the proof in the case. While they cannot stand alone as full proof, they are nonetheless to be weighed with the other proofs, and with all the circumstances of the case. In other words, in cases involving the public good, the uncorroborated judicial confession by one party or the declarations of the parties in judgment alone cannot allow the judge to reach the requisite moral certitude. However, if the other probative elements in the case thoroughly corroborate the judicial confession or declarations, so that there arises no substantial contradiction, the said confession and/or declarations can form for the judge a part of the proofs he uses to arrive at his decision.

The requirements of this paragraph can be seen as compelling the judge to walk a very fine line in evaluating and weighing judicial confessions and declarations of parties given in judgment. They can also be read as one more piece of evidence of the Church's rejection of positivism as a legal system, where everything is reduced to systems of legal maxims and *stare decisis.* The judge is forced to come out of the cocoon of legal theory to deliberate on all of the facts and circumstances of the case at hand. Common sense alone teaches that the unsupported word of a party to a case cannot constitute full proof in any serious judicial system. But parties on occasion do tell the truth and our canonical system accounts for that too by provisions such as this.

2. Cf. L. CHIAPPETTA, *Il Codice di Diritto canonico: commentario giuridico-pastorale,* II (Naples 1988), p. 642f, no. 4896.

1537 Quoad extraiudicialem confessionem in iudicium deductam, iudicis est, perpensis omnibus adiunctis, aestimare quanti ea sit facienda.

It is for the judge, having considered all the circumstances, to evaluate the weight to be given to an extra-judicial confession which is introduced into the trial.

SOURCES: c. 1753; *PrM* 116

CROSS REFERENCES: c. 1535

COMMENTARY

Thomas G. Doran

The *CIC* omits the definition of an *extrajudicial confession* which was given in the abrogated law, perhaps because a working definition can so easily be deduced from the definition of the judicial confession in c. 1535. However, c. 1753 of the *CIC*/1917 did give such a definition;[1] it defined an extrajudicial confession as a confession either written or oral to the other party (*adversario*) in person or to others made outside the judgment (that is, *not* in the presence of the judge or his delegate or auditor; in other words, outside the judicial process) and brought forth in judgment. The extrajudicial confession has often been called a *probatio probanda.* It can be useful, provided its authenticity and veracity can be established, usually by the corroborating testimony of credible witnesses

Father Wrenn observes: "The extrajudicial confession in a marriage case is somewhat different from one made in a penal case, because in a marriage case it is often not a confession in the true or strict sense since it is not really *contra se.* Nevertheless, should a party, before or shortly after marriage, mention, for example, that he or she did not intend to have children, that clearly is a significant remark."[2] Thus, *Provida Mater* 116 requires that "the extrajudicial confession of a consort which impugns the validity of marriage and which has been made before the marriage was contracted or after the marriage, but at a time that was not suspect, is to be duly estimated by the judge as an adminicular support of proof." And

1. "Confessio sive scripto, sive oratenus, ipsimet adversario aut aliis extra iudicium facta, dicitur extraiudicialis: eaque in iudicium deducta, iudicis est, perpensis omnibus rerum adiunctis, aestimare quanti facienda sit."
2. J.A. CORIDEN-T.J. GREEN-D.E. HEINTSCHEL (Eds.), *The Code of Canon Law: A Text and Commentary* (New York 1985), pp. 978ff.

Monsignor Joseph Pinna, once a Prelate Auditor of the Roman Rota and later Secretary of the Supreme Tribunal of the Apostolic Signature allowed that when trustworthy witnesses testify to an admission of simulation that was made by a party in the non-suspect time, the judge may consider that statement to amount to an extrajudicial confession.[3]

All other things being equal, in evaluations of this sort, written confessions are preferable to oral ones, and, as always, actions speak louder than words. The judge must be extremely conscientious and astute in ascertaining the exact words the party used in making the alleged extrajudicial confession, and when, where, to whom, under what circumstances, for what reason, in what frame of mind, with what degree of seriousness, etc., the alleged extrajudicial confession was made. If the time and place and circumstances of the said confession can be determined so that the confession itself can be placed outside the suspect time, and if it can be determined that the party had good reason, with appreciable reflection, and seriously said the words attributed to him, then the confession can be of considerable use. The judge is then to weigh the confession in terms of all the other facts and testimony given in evidence, and all the circumstances of the case. Having done all this, the judge will be in a position to state the probative value of such an extrajudicial confession.

3. Cf. *SRR Dec* 52 (1960), p. 318.

1538 **Confessio vel alia quaevis partis declaratio qualibet vi caret, si constet eam ex errore facti esse prolatam, aut vi vel metu gravi extortam.**

A confession, or any other declaration of a party, is devoid of all force if clearly shown to be based on an error of fact or to have been extracted by force or grave fear.

SOURCES: c. 1752

CROSS REFERENCES: cc. 125, 126

COMMENTARY

Thomas G. Doran

Concluding this section, c. 1538 lays down certain conditions for the validity of any of the kinds of statements made by the parties in judgment, be they: (1) *judicial confessions* or (2) *extrajudicial confessions* or (3) *declarations in judgment by the parties*. Such statements lack any and all probative force if they: (a) are proved to have been made through factual error or (b) are extorted by force or grave fear.

In effect, this canon is a particular application of cc. 125–126 on juridic acts.

The law makes specific provision for such statements extorted by physical force (*vis*—cf. c. 125, §1) or moral force (*metus gravis*)—cf. c. 125, §2).

A factual error can have many causes: inexact knowledge, ignorance, inattention, misunderstanding, lack of personal knowledge, forgetfulness, deceit, etc.To deprive statements given by the parties in judgment of probative force, the existence of one or more of these causes must be proven to have influenced the statement (cf. c. 126).

CAPUT II
De probatione per documenta

CHAPTER II
Documentary Proof

1539 **In quolibet iudicii genere admittitur probatio per documenta tum publica tum privata.**

In every type of trial documentary proof is admitted, whether the documents be public or private.

SOURCES: c. 1812; *PrM* 155

CROSS REFERENCES: cc. 1527, 1539, 1567 § 2, 1574–1583, 1686

COMMENTARY

José María Iglesias Altuna

Following a tradition that began with the decretals of Gregory IX (*X* II, 22, *De fide instrumentorum*), but which has a forerunner in the Digest (book 22, tit. 4), *CIC*/1917 in the chapter entitled *De probatione per instrumenta*; the term "instrumenta" is retained in subsequent procedural norms, such as those promulgated by the SCDS Decree *Catholica Doctrina* of May 7, 1923 and *Provida Mater.* Yet, in spite of this title, the reality is that subsequent canons and articles only use the word "documenta," so for the majority of canonical doctrine, "instrumenta" and "documenta" have come to be synonymous.

Something similar occurs in secular law. For example, article 1215 of the Spanish Civil Code states that "evidence may be admitted in the form of instruments, confessions ..." but the following sections only mention public and private documents. Thus a sector of civil doctrine affirms that instrument—which has a certain archaic feel—and document are identical.

However strictly speaking, instrument and document differ. In a broad sense, the word "instrument" (from "instruere") means anything useful in a trial for the instruction of the case or which serves to determine the truth, which includes "document." In positive law, a document is something written that proves, shows or demonstrates something. A document could thus be a written "instrument" in which the physical material on which it is written is unimportant: it could be paper (the only material stipulated in the norms regulating documents), parchment, cloth, wood, metal, even stone, etc., although it seems to be implicit in the legal concept of document that writing must be incorporated into something that can be put into the procedural acts; otherwise, it would only become part of the procedural acts by other means, such as a notarized act or judicial examination.

But there are other unwritten instruments that may also be used to "communicate," i.e., to discover, show or make something known and which may have probative value inasmuch as they represent or illustrate something (such as drawings, sketches, designs, photographs, paintings, etc.) or can be understood by viewing or hearing via the proper technical means (films, videos, tape recordings, etc.).

This is why these marvelous technical inventions, most suitable for easily conveying news, ideas, etc., are called "instrumenta communicationis."[1]

It seems then that we can speak of "instrumenta scripta" and "instrumenta non scripta,"[2] of which the genus is "instrument" (something that can be used to inform), which may be subdivided into "written" and "non-written."

Things that may be proofs other than in writing are not considered documentary evidence in the *CIC*, although at times they may show and illustrate ("docent": document) facts more clearly than in writing, precisely because they are good at capturing fleeting facts, containing many details that escape the notice or attention of witnesses describing these facts at a later date.

The *CIC*/1917 Reform Commission changed the title of this chapter to *De probatione per documenta* in spite of those who proposed that the phrase "per instrumenta" be retained on the grounds of the generic meaning of the term so that tape recordings or other similar instruments containing information on and records of facts could be "sub latiore locutione" understood as admissible under this phrase. The proposal was rejected because these "instruments" quite often lack any element (for

1. Cf. IM, 1, and tit. IV of Liber III of the CIC, where the adjective "socialis" only indicates its undefined range.
2. M. LEGA, *Commentarius in iudicia ecclesiastica*, II (Rome 1950), p. 781.

example, a signature, etc.) that lends credence to the document.[3] The Commission had already described the use of tape recorders as "adiutorium scripturae"[4] pursuant to c. 1567 § 2, i.e., provided the recording is transcribed and signed, if possible, by the persons making the statement. Magnetic tape alone is not admissible because it is said that the dangers of falsifying these technical media are many.[5]

The fact is that the Commission, which did not provide a definition of "document" ("cum definitiones in iure vitandae sunt"[6]), does not treat in the *CIC* in any place unwritten instruments and any written texts that are not set down on paper. In this case, the evidentiary procedure required for judicial examination (cc. 1582–1583) must be followed, alone or in conjunction with expert examination (cc. 1574–1581), depending on the case.

This now has special importance, since the progress of technology is moving away from paper in the marketplace and in the judicial matters as technology advances. The use of video or audio tape or any other spoken or visual representation of thought poses a challenge to procedural law to modify its old concept of what a document is and the need to broaden and institute new procedures admitting the use as evidentiary instruments of other means of reproducing thought that have become widely available in modern social life.[7]

Canon 1527, which has no precedent in *CIC*/1917, opens the possibility of submitting any evidence that is useful and legal, and "teniolae magneticae et alia huiusmodi" are not prohibited in tribunals.[8]

Documentary evidence, which is admissible in proceedings of all kinds (cf. c. 1539), is inexcusable in the so-called matrimonial "documentary process" (cf. c. 1686).

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3. Cf. *Comm.* 11 (1979), p. 105.
4. Cf. *Comm.* 4 (1972), p. 63.
5. Cf. *Comm.* 10 (1978), p. 263.
6. Cf. *Comm.* 11 (1979), p. 105.
7. Cf. V. CORTÉS DOMÍNGUEZ, in *Derecho Procesal*, I (Valencia 1986), p. 430.
8. Cf. *Comm.* 10 (1978), p. 263.

ART. 1
De natura et fide documentorum

ART. 1
The Nature and Reliability of Documents

1540 **§ 1. Documenta publica ecclesiastica ea sunt, quae persona publica in exercitio sui muneris in Ecclesia confecit, servatis sollemnitatibus iure praescriptis.**

§ 2. Documenta publica civilia ea sunt, quae secundum uniuscuiusque loci leges talia iure censentur.

§ 3. Cetera documenta sunt privata.

§ 1. Public ecclesiastical documents are those which an official person draws up in the exercise of his or her function in the Church and in which the formalities required by law have been observed.

§ 2. Public civil documents are those which are legally regarded as such in accordance with the laws of each place.

§ 3. All other documents are private.

SOURCES: § 1: c. 1813 § 1; *PrM* 156 § 1
§ 2: c. 1813 § 2; *PrM* 156 § 2
§ 3: c. 1813 § 3; *PrM* 156 § 3

CROSS REFERENCES: cc. 22, 484, 1105, 1121–1123, 1522

COMMENTARY

José María Iglesias Altuna

1. The distinction between public and private documents depends on the persons who take part in their formulation. Public documents are prepared (written originally or transcribed as authentic copies) by a public official within the scope of his or her competence in accordance with legal requirements, and the remainder are private documents, i.e., documents that are produced, written and if necessary signed by private persons.

For the purposes hereof, ecclesiastical public persons are those holding an office in the Church by virtue of which they are authorized by law to prepare documents, i.e., to prepare acts and documents related to decrees, dispositions, obligations or other matters that require their intervention; to record in writing whatever has occurred and sign them, giving the place, time, day, month and year; to show to whoever legitimately asks to see any acts or documents found in the records, and authenticate copies by declaring that they are in conformity with the originals (cf. c. 484, which lists the duties of diocesan curia notaries, which extend "suo modo" to any other positions—secretaries, clerks, parish priests, etc.—to which the legal authority to certify documents has been granted). In exercising one's duties of office, no person may document any acts other than those he or she has either done himself or has direct knowledge of by virtue of having been present when another person prepared the act or indirectly by virtue of the fact that the person who prepared the act has informed the first person verbally or in writing, in his or her capacity as a qualified or unqualified witness who can attest to that act[1](cf. cc. 1121, 1122 and 1123, for example).

2. Using the casuistic list given in c. 1813 *CIC*/1917, public ecclesiastical documents may be classified as follows:

a) administrative documents (by the Roman Pontiff and Roman Curia, bishops and their curias and authentic copies thereof; records of baptism, confirmation, ordination, religious profession, marriage and death that are kept in the registers of the curia, parish or religious houses and authentic copies and testimonies thereof;

b) judicial documents;

c) notarized documents.

Public civil documents are documents recognized as such under local laws.

3. In strictly notarized documents, i.e., documents signed or executed before a notary, a distinction must be made between sworn statements and acts. *Sworn statements* contain declarations, which are juridical acts that involve consent and cover contracts of all kinds. *Acts* are intended to record facts or circumstances that are witnessed by or evident to notaries that by virtue of their nature are not matter for contracts. There are acts:

— *of presence* to vouch for the truth or reality of a fact;

— *of notification to or summons of a party*;

— *of reference*, whose purpose is to record testimony (statement of knowledge) by a deponent about the deponent's or others' actions that the deponent has witnessed or learned.

1. Cf. J.J. GARCÍA FAÍLDE, *Nuevo Derecho Procesal Canónico* (Salamanca 1992), p. 13.

— *of public knowledge*, whose purpose is to prove and record facts that are well-known;

— *of record*, whose purpose is the entry of a private document in a notary's register book;

— *of deposit*, or receipt as a deposit, of objects, securities, documents, sums of money, etc., for safekeeping or as a contractual pledge.

Other notarized documents include *affidavits* attesting to the existence of documents that are brought to notaries by interested parties; *authentication*, upon comparison with the original, of copies, photocopies, xerographic reproductions, etc., that are submitted to notaries; and authentication of signatures, legalizations, etc.

Strictly speaking, given the juridical type of reality that is being documented, notarized documents should be considered private rather than public, but even though they are not public documents, they are authentic or reliable documents, and the production of said authenticity or reliability is precisely what justifies their creation or recognition by the law. As far as effectiveness is concerned, notarized documents, then, are fully comparable to public documents, and they are listed among "public documents" in legal texts.[2]

4. In a document, a distinction should be made between the document itself and the fact that is being documented, i.e., its contents. The contents do not change their proper nature as a means of evidence by virtue of insertion in a document. For example, statements by parties or witnesses, expert reports, etc., upon inclusion in a document, do not become documentary evidence, strictly speaking, but remain subject to the procedural rules applicable to such specific means of evidence.

On the other hand, notarized documents containing private statements or protocol or deposit of a private document in a notary's official records are public only with respect to the existence of these statements, but the statements and deposited documents themselves remain private. A private document registered by a notary remains a private document, and the only public aspect thereof is the fact that it has been registered.[3]

A document may be an *original* or a *copy*, in which case the original has a public author, and the copy may have a different public author. If a copy (which may be written by hand, typed, photocopied or reproduced xerographically, etc.) is declared to be in conformance with the original, it is known as an *authentic* copy. A document is called *authentic* if it is written by the author to whom it is attributed, and it is called *genuine* if what is expressed or related therein is objectively true.

2. Cf. J. GUASP, *Derecho Procesal Civil*, I (Madrid 1968), p. 396.
3. Cf. C. DE DIEGO-LORA, "La apreciación de las pruebas de documentos y confesión judicial en el proceso de nulidad de matrimonio," in *Ius Canonicum* 7 (1967), p. 543.

The terms "authentic" and "genuine" are often used synonymously, but the meaning of each term should always be distinguished.[4] A given public or private document may be authentic with respect to its author, but its contents may be false or not genuine.[5]

Depending on its use, a document may be *constitutive* to an act or simply *evidentiary,* depending on whether it is required in order for an act to be valid or whether it is only needed to prove the act. A typical example of the former is the mandate that is necessary to contract matrimony validly by proxy (cf. c. 1105).

With respect to the trial, documents may be judicial (case acts, for example, per c. 1522) or extra-judicial. The latter may be pre-constituted if prepared with the intent of submitting them as evidence at the appropriate time or pre-existing if prepared for reasons unrelated to any use as evidence.

5. It should be kept in mind that insofar as documents are concerned, procedural canonical law uses substantially the same system of basic rules as secular juridical systems, but that in any case, civil laws to which Church law refers (as is the case in c. 1540) should be respected in canon law with the same consequences, as provided under c. 22.

4. Cf. M. LEGA, *Commentarius in iudicia ecclesiastica,* II (Rome 1950), p. 782.
5. Cf. *coram* BRENNAM, March 28, 1957, in *SRR Dec* 49 (1957), p. 265, no. 5.

1541 Nisi contrarils et evidentibus argumentis aliud evincatur, documenta publica fidem faciunt de omnibus quae directe et principaliter in iis affirmantur.

Unless it is otherwise established by contrary and clear arguments, public documents constitute proof of those matters which are directly and principally affirmed in them.

SOURCES: cc. 1814–1816

CROSS REFERENCES: cc. 63, 128, 1391, 1540, 1587ff, 1608, 1717, 1729ff.

COMMENTARY

José María Iglesias Altuna

1. The probative efficacy of public documents is limited to what is "directly and principally" affirmed in them. In a document, a public official attests to what he directly perceived "de visu et auditu, suis sensibus" and records the fact that is the reason for the document, which is to say that this probative efficacy cannot be extended to the entirety of the document, but only to the basic event mentioned in it and what the public person perceives with his or her senses.

For example, in the case of a baptismal certificate, the principal fact is that this sacrament was conferred, and what was perceived by the senses is the *how*, *when*, *where* and *who* of the baptism, not the person's age, birth or parentage, which are the principal facts of birth certificates recorded with the civil register. From this, it follows that civil birth certificates are more credible evidence of birth than certificates issued on the basis of the baptismal register, which only directly attest that this sacrament was received.[1]

Furthermore, entries in the marriage register attest to and constitute "probatio probata" of the fact that matrimony took place between certain persons, but not of other events mentioned indirectly in those entries, such as, for example, the age or status of the bride and groom, witnesses, godparents, delegation, etc., which are "probationes probandae,"[2] since the entry is limited principally and directly to the event being recorded, which is the fact that matrimony was celebrated, although it is true that

1. Cf. *coram* LEFEBVRE, April 16, 1959, in *SRR Dec* 51 (1959), p. 207, no. 4.
2. Cf. *coram* JULLIEN, May 3, 1939, in *SRR Dec* 31 (1939), p. 264, no. 3.

the witnesses and license of the person officiating are requirements for the marriage to be valid.

Notarized public documents mention the presence of persons appearing before the public official; the appearance of other persons, if any (witnesses, marital interventions, etc.); statements of fact, i.e., things the official, in the performance of his or her duties, witnesses, hears, sees and credibly records, indicating the place, year, day and time of issuance of the document. What is principally and directly stated in a document is everything that constitutes its formal aspect, but not material or substantive aspects, which in principle do not enjoy the protection of authenticity that clothes the formal aspect. The notary attests that statements contained in the document were thus expressed, but he can never authenticate whether those statements are true or whether they were voluntarily given.

2. The probative efficacy of public documents, which is based on the presumption of authenticity and genuineness, can be attacked, first, by a direct challenge claiming they are false. A document may be *materially false*, i.e., in reference to the external object or body of the document, or it may be *factually false* if it affects the intrinsic or spiritual contents of the document.

Material falsification includes forging or falsifying handwriting, signatures or initials; any altering of or addition to a true document so as to change its meaning thereof; adding anything to any entry, record or official book; and counterfeiting a document so as to make it seem authentic.

Factual falsification of a document includes listing persons who did not actually appear; making declarations or statements other than those actually made by persons who did appear; misrepresenting the truth in recounting the facts; altering dates (although if the date is altered by erasing or removing the legitimate date and replacing it with a false date, this would constitute a materially false document); and issuing a certified copy of a presumed document or stating anything in that copy that is different from or contrary to the true document.

Such presumed facts, which are thus described under article 302 of the Spanish Penal Code and which are directly applicable to Spanish civil public documents, may constitute possible falsification or forgery of ecclesiastical public documents, which are listed more generally in c. 1391, to which should be added the use of these documents, whether they are public or private ecclesiastical or civil documents, in an ecclesiastical matter. Falsification of an ecclesiastical public document expressly includes *obreption* and *fraudulent omission* in rescripts. Obreption consists of presenting false information, and fraudulent omission consists of omitting an important piece of information that the law, style and canonical practice dictate should be mentioned. Either prejudices the validity of rescripts (cf. c. 63).

Furthermore, an ecclesiastical document ceases to be a public document if it turns out not to have been written by a public person in the performance of his ecclesiastical duties or if the formalities required by law have not been met (c. 1540 § 1), which is logically applicable to civil documents if they are drawn up in a manner that does not meet personal or formal requirements of the civil law in a given place in order to be considered public documents (c. 1540 § 2).

The falseness of a document (which may be pursued, by informing an ordinary, in penal procedures, which do not constitute an action or complaint (cf. c. 1717) or preclude possible intervention in a penal proceeding by seeking compensation for possible damages [cf. cc. 128, 1729f f.), is normally dealt with as an incidental matter under cc. 1587ff.

3. A public document is credible in everything that is directly and principally asserted "unless it is otherwise established by contrary and clear arguments," i.e., by producing other evidence to the contrary, since a public document only has privileged value as a means of evidence as an individual or isolated piece of evidence, not as evidence that is combined with other evidence (a confession or testimony of a witness or expert or presumptions, etc., including other public or private documents), in which case combined weighing of evidence at the discretion of the judge obtains (cf. c. 1608).[3]

3. Cf. J. GUASP, *Derecho Procesal Civil*, I (Madrid 1968), p. 404.

1542 Documentum privatum, sive agnitum a parte sive recognitum a iudice, eandem probandi vim habet adversus auctorem vel subscriptorem et causam ab iis habentes, ac confessio extra iudicium facta; adversus extraneos eandem vim habet ac partium declarationes quae non sint confessiones, ad normam can. 1536 § 2.

A private document, whether acknowledged by a party or admitted by a judge, has the same probative force as an extra-judicial confession, against its author or the person who has signed it and against persons whose case rests on that of the author or signatory. Against others it has the same force as have declarations by the parties which are not confessions, in accordance with can. 1536 § 2.

SOURCES: c. 1817

CROSS REFERENCES: cc. 1528, 1536, 1537, 1540

COMMENTARY

José María Iglesias Altuna

1. According to c. 1540, all documents that are not public are private documents. Canon 1813 of the *CIC*/1917 defines private documents as "scripta a privatis confecta," which is not always true, since some documents, in spite of the fact that they would seem to be public, are private by virtue of having been written by a non-competent notary or because of a formal defect or because, in the case of having been written by a public notary in the performance of his or her duties in a manner that meets all required formalities, whose contents are strictly private (for example, notarized certificates and documents of record, etc.), although the public person's certification of the fact and circumstances of his role is public and credible.[1] In the case of such documents, although they are one formal document, there are actually two documents by authorship: a declaration of a public official on one hand and a declaration by private persons on the other hand. However, the definition given in *CIC*/1917 is fundamentally true, and private documents thus include contracts, receipts of payment and other receipts, private papers, personal diaries, letters, etc., written by private individuals.

1. Cf. *coram* BRUNO, June 22, 1984, in *SRR Dec* 76 (1984), p. 382, no. 5.

2. A private document has probative force if it has been acknowledged by its author or admitted by a judge.

Acknowledgment by the author may be expressed verbally or in writing before a judge, or tacitly if no objection to the document is made within the period of time stipulated for objections during the case especially if no special period of time for doing so has been indicated. If the document is submitted with the petition and is not denied during the case, the judge may consider it admitted if the party against whom it is submitted acknowledges it and is aware that the opposing party is basing his or her right, in whole or in part, on this document, and this must be recorded when the document is made available at the time of the petition or the reply to the petition.

If the party to whom the document is attributed denies it, the party submitting the document must prove its authenticity to the judge's satisfaction. Acknowledgment shall be summarized incidentally and, depending on the case, witnesses may be heard who signed the document or who saw it being written or who were otherwise aware of it, and if necessary, a handwriting expert may be consulted. The judge may decide the authenticity of the document in an interlocutory decision or, normally, reserve judgment till the final decision.[2]

3. If the case has to do with a private matter that does not involve the public good, a private document, if it contains any "contra se et pro adversario" statement and is acknowledged by the party or admitted by the judge, only has the probative force of an extra-judicial confession against its author, signatory or successors. Therefore, the party favored by that document may not claim that that document relieves him or her of the burden of proof as would a confession in the strict sense (cf. c. 1536), inasmuch as it is incumbent upon the judge to determine its value on the basis of all the circumstances (cf. c. 1537), especially if the author manages to explain the document in such a way that it does not favor the party that it allegedly benefited.

Such documents have the same force against outside parties as statements made by parties that are not confessions (cf. c. 1536 § 2), since they constitute "res inter alios acta," which is not the case if an outside party expressly acknowledges the document.

4. In cases affecting the public good, including marriage cases, it is necessary to carefully keep in mind the distinction (which is also applicable to documents and proceedings of all kinds) between a confession and a simple statement that is not a confession (cf. c. 1536 § 2).

The term *confession* is frequently found in doctrine and canonical jurisprudence. It is applied to everything a party says about disputed facts in a trial, including those in one's favor and those against, and those in favor

2. Cf. T. MUÑIZ, *Procedimientos eclesiásticos*, III (Madrid 1976), p. 307, no. 375.

of marriage and those against the bond, such that an "assertio," "asseveratio," "affirmatio," "declaratio," etc. of simulation are equivalent to a "confesio simulantis." However, strictly and properly speaking, a confession is only a "contra se et pro adversario" statement made by a party, in the "pro vinculo" case, when the alleged author of the simulation denies the simulation, whereas a "pro se adversus matrimonii valorem" statement is precisely the statement that must be proved.

So then, since these confessions or statements that are not confessions, having been made "extra iudicium," are submitted "scripto" in a trial, a document containing these confessions or statements may have been preconstituted with probative intent or it may have been produced without probative intent. In this type of proof written before or after the celebration of marriage, but extra-judicially, a distinction must be made on one hand between documents containing statements of awareness, acknowledgments of subjective personal situations, things shared with third parties in confidence in the course of events, i.e., spontaneous statements about lack of consent, coercion, fears suffered, etc., for example, and on the other hand, statements written with the intent of a future nullity and made for the specific purpose of being able to prove nullity at a later date. Statements of either type, by virtue of different intents and purposes, must be treated differently.[3] Either may acquire probative force, but by different procedures and reasoning.

For example, if a document has been drawn up prior to marriage with the intent of being able to be counted on as a means of proof to obtain a declaration of nullity in the event that the marriage does not turn out to be a happy one, its probative value, provided it is authentic and its date of preparation is indicated, depends not so much on the content (which perhaps contains non-existent grounds of nullity) as in the fact that the author, in writing the document, was cognizant of preparing proof against the validity of the marriage and a means by which at some point it would be possible to obtain a declaration of nullity. The very fact that such a document was written and especially if it was recorded or notarized by a notary public, as is usually the case, in itself constitutes an element of great importance in clarifying the author's intent,[4] which automatically constitutes a principle of proof of exclusion of indissolubility.

If a document has been drawn up with the intent of leaving a record of certain facts (intent to simulate or exclude, the fact of simulation or exclusion, coercion or fears inflicted, etc.), its probative value is great, provided it can be demonstrated that the document is authentic, spontaneous and serious and that it clearly meets the necessary requirements for the ground of nullity in question. Its force is greater than statements made

3. Cf. C DE DIEGO-LORA, "La apreciación de las pruebas de documentos y confesión judicial en el proceso de nulidad de matrimonio," in *Ius Canonicum* 7 (1967), p. 559.
4. Cf. *coram* ROGERS, May 17, 1969, in *SRR Dec* 61 (1969), p. 540, no. 5.

before witnesses, since it must be remembered that in general, one is more cautious and deliberate when committing something to writing than when speaking, and that a written document thus reflects more faithfully the "mens scribentis" so that a document is immune from erroneous interpretations.[5]

Documents that are not drawn up with use as evidence in mind (letters between spouses, records, notes, personal diaries, etc.) that were written before or after the celebration of the marriage, but at a non-suspect time when there was no thought of questioning the marriage and there were no reasons to hide or falsify the truth, have greater value precisely because they are not suspect by virtue of the fact that they were written in non-suspect time, their spontaneity and their absence of interest in writing them for use as evidence.

But all such extra-judicial representations by the parties, to the extent that they have a certain probative value, are "probationes probandae" by other means of evidence.

This is true of documents that submit extra-judicial statements in court that seem to constitute a confession in the strict sense because they are "pro vinculo," since a "pro matrimonio" statement is not always contrary to the confessing party's interests (the sole case of a true confession). Sometimes it is "pro se," as is the case when the respondent objects to a declaration of nullity of marriage or when the petitioner defends the validity of a prior marriage in order to obtain a declaration of nullity of a second marriage by alleging an impediment to marriage. In any case, whether it is a confession or not, it is incumbent upon a judge to assess the weight that should be given such documents in the light of other circumstances of the case and facts proved by other means.

Public or private documents submitting statements in court (made, with the judge's prior approval, to a notary public or a layperson appointed by the judge or by some other legitimate means (cf. c. 1528) for use as evidence in a trial that has already been brought, even if made without judicial formalities) by parties or witnesses that decline to appear before the judge to reply are unique. The weight given to such documents, as is logical, is subject to the judge's prudent consideration.

5. Cf. *coram* BRUNO, February 15, 1985, in *SRR Dec* 77 (1985), pp. 78–79, no. 5.

1543 **Si abrasa, correcta, interpolata aliove vitio documenta infecta demonstrentur, iudicis est aestimare an et quanti huiusmodi documenta sint facienda.**

If documents are shown to have been erased, amended, falsified or otherwise tampered with, it is for the judge to evaluate to what extent, if any, they are to be given credence.

SOURCES: c. 1818

CROSS REFERENCES: cc. 1541, 1542

COMMENTARY

José María Iglesias Altuna

1. A document as an extrinsic object or documentary "corpus" may be tainted by defects that to a greater or lesser degree affect its authenticity.

Public documents do not present serious problems with authenticity because of the formalities that inform surrounding their preparation, guarantees deserving of public credence and they are protected by sanctions in the penal system. Further, there is usually access for juridical purposes in the form of copies issued by public notary, and their authenticity can be checked by simply comparing them with the original on file in the respective protocol.

2. On the other hand, private documents are more easily susceptible to material forgery. The parts most likely to be forged are:

a) Signature. Generally, a document is signed by affixing one's own name, in one's own hand, at the end of the document, and this signature is accepted as a statement that the document was prepared by the person signing it, even if the document is written in someone else's hand. A signature usually consists of the signatory's surname(s), although this is not a requirement. A given name or nickname suffices, including generic terms ("dad," "mom," etc., for example) or a familiar name or a professional name. Signatures consisting of initials or only a personal flourish seem to be more doubtful, but are accepted, provided it is shown that they are of an author that customarily signs in such a way.

b) Date. Dating a document entails an indication of the place and date when the document was signed.

c) Written text. In the strict sense, this is the part of a document containing the matter or declaration being documented. This therefore excludes the signature and date, seals, stamps and letterhead information that is generally printed on the paper. Such text is usually typed or handwritten.

3. Falsifications may be committed:

a) By forgery, which may be done *freely*, in which case it is done quite spontaneously, without reference to the text being forged; *methodically*, by slowly and accurately copying the original, which is at hand; by *tracing*; etc. The latter is commonly done to forge signatures. On occasion one finds reverse counterfeiting in the form of *disguising* or *feigning*, when an author changes his own handwriting so as not be recognized.

b) By alteration: *deleting* by scratching out, whiting out (with chemicals), erasing, etc., or *adding* something in the margin, between words or lines or in the open space at the end of a line, or *altering* one word to form another.

4. Proving these particular falsifications often requires various techniques recommended on a case-by-case basis by the experts to whom disputed documents are submitted for analysis and an opinion. But there are cases in which a document has an external appearance that looks absolutely normal, with nothing that would lead one to suspect a falsification or alteration, but a reading of the document (its contents or intellectual context) may reasonably betray falsification. In such cases, methods are available other than technology. These methods only involve the following logical procedure:

a) Historical anachronism. A document may be recognized as counterfeit by a direct mention of an event that occurred subsequently to the date indicated in a suspect document or by more or less indirect references to later events.

b) Semantic anachronism. This is the case when a document contains a manner of speaking that did not exist at the time the document was dated, and this method is more reliable in the case of documents having to do with legal acts written by professionals that do not easily vary from the language and styles of the profession.

c) "Argumentum e silentio." If an event that one would expect to be mentioned is not mentioned and if there is no reason for not mentioning it, this omission invites the presumption that the document may not be from the time that event occurred.

d) Discrepancy of character. A document, on the whole, has qualities that are clearly superior or inferior (with respect to knowledge, intelligence, and morality) than those expected of the person to whom the document is attributed. Also if opinions, values or inclinations revealed by the alleged author are not consistent with what is known about that author.[1]

Once any defect has been shown in a document, it is incumbent upon the judge to determine whether and to what extent it should be given any weight.

1. 1Cf. L. MUÑOZ SABATÉ, *Técnica probatoria* (Barcelona 1967), pp. 353–385.

ART. 2
De productione documentorum

ART. 2
The Production of Documents

1544 **Documenta vim probandi in iudicio non habent, nisi originalia sint aut in exemplari authentico exhibita et penes tribunalis cancellariam deposita, ut a iudice et ab adversario examinari possint.**

Documents do not have probative force at a trial unless they are submitted in original form or in authentic copy and are lodged in the office of the tribunal, so that they may be inspected by the judge and the opposing party.

SOURCES: cc. 1819, 1820; *PrM* 159, 160

CROSS REFERENCES: cc. 484,3°, 1471, 1474, 1475, 1516, 1529, 1593 § 1, 1596 § 3, 1598 § 2, 1600 § 2, 1639 § 2, 1658 § 2, 1690, 1710, 1728

COMMENTARY

José María Iglesias Altuna

1. Except for oral contentious process,—in which cases for the declaration of nullity of matrimony (c. 1690), sacred ordination (c. 1710), and penal trial (c. 1728) are excluded—where at least authentic copies of documents on which the petition is based must be added to it (c. 1658 § 2), the *CIC* generically prescribes that evidence not be admitted prior to the joinder of issue (c. 1529). The proper time to submit documents is therefore the time set by the judge for presenting evidence (c. 1516).

However, there are cases and documents that should be presented "ex natura rei" with the petition and, as the case may be, with the response to the petition:

— mandate for the procurator and advocate;

— documents proving domicile and quasi-domicile for the purposes of competence;

— documents proving age, baptism, marriage, sacred orders, public vow of perpetual chastity, kinship, dispensation from impediments, defect of legitimate form, special mandate for contracting marriage by proxy, etc.

In a word, any document(s) on which the right which claims or opposes the adverse petition is founded—in the ordinary contentious process, oral process (cf. c. 1658 § 2) and especially in the documentary process—offers a principle of proof of the terms of the controversy which are set by the joinder of issue.

Once the time for presenting proofs has passed, besides the right of an absent party (cf. c. 1593 § 1) and the intervention of a third-party (cf. c. 1596 § 3), parties may present documents after the publication of the acts, before the decree of the conclusion of the case (cf. c. 1598 § 2) and after the conclusion of the case (cf. c. 1600 § 2). Further, it is possible to present documents at the appeal level (cf. c. 1639 § 2).

Although these possibilities, which are contrary to the principle of preclusion, allow the presentation of documents outside the proof stage, these documents should be submitted as soon as possible so that they can be reviewed by the judge and the opposing party and acknowledged or challenged, as the case may be, without prejudice to the desired economy of the proceeding and to avoid the suspicion that the actual intent for submitting documents late is to delay the case. Canon 1600 § 2, which authorizes a judge to order or allow the submission of a document after the conclusion of a case, makes this faculty contingent upon whether the document in question "perhaps was not submitted earlier through no fault of the interested party."

2. In order for documents to have probative force in a case, they must be submitted in the original or in the form of authentic copies. Original public documents are normally entered in records or archives. Consequently, the documents that are submitted during the juridical stage are copies of original documents made by an official who certifies the copies as being true and faithful to the originals (cf. cc. 484,3°, 1474 and 1475 as the case may be).

Private documents (unless they have been entered in a notary's records or the case file of another trial) must be presented in the original, although it is possible to submit certified copies, photocopies, xerox copies, etc., by showing the original to an ecclesiastical or civil notary in accordance with the laws of each location. Of course, if the opposing party or in general the person in the case who would be adversely affected by the document expressly acknowledges or does not challenge an uncertified copy, that copy shall be valid and effective. But if this is not the case, the existence of the original must be established and any photocopy,

xerox copy, etc. must be certified as an exact copy of the document in question.

If a document is in a language that the judge or parties to the case do not know, it must be translated into a language the judge and the parties do know, and due precautions shall be taken to ensure that the translation is faithful. If it is necessary to employ a translator to make an exact translation, a translator shall be appointed by the judge (cf. c. 1471 by analogy).

1545 **Iudex praecipere potest ut documentum utrique parti commune exhibeatur in processu.**

The judge can direct that a document common to each of the parties is to be submitted in the process.

SOURCES: c. 1822

CROSS REFERENCES: cc. 1531, 1644, 1645

COMMENTARY

José María Iglesias Altuna

1. If the party in possession of a document does not submit that document on one's own initiative, the judge, at the other party's request, may direct the submission of the document in the case if that document is common to both parties.

If that party refuses, with no legitimate excuse, to submit a document presumed to be of some weight in the case and it is said to be in his or her possession, it shall be incumbent upon the judge to determine what importance to give to that refusal. If that party denies having the document in his or her possession, the judge may subject that party to judicial examination (cf. c. 1824 §§ 2 and 3, *CIC*/1917).

The parties have an implicit duty not to hinder each other in the proof phase, since a party has the right to the proof in the sense that not only should that party be able to prove all pertinent admissible facts, but also that the opposing party is also obligated not to do anything that would impede him or her from obtaining that proof. In an extreme example of such obstructive behavior—which would be grounds for "in integrum" restitution in general (cf. c. 1645) or "ulterior propositio" restitution in cases concerning the status of persons (cf. c. 1644)—the sentence could be considered manifestly unjust because documents were withheld by fraud of one party to the detriment of the other party if the discovery later of those documents proves new facts without a doubt that demand a decision to the contrary (cf. c. 1645 § 2,2° and 3°).

A party's procedural conduct (although it should not be forgotten that it is almost always the behavior of the advocate and the procurator rather than the client) is not a means to a "sui generis" proof, but simply a source of presumption or an indication that the judge can consider, just as he may consider and weigh with a view to the proof of facts the attitude of a party that refuses to reply when legitimately interrogated (cf. c. 1531).

There are also documents of a unilateral nature that are sent by one party to the other, such as letters, of which the sender may only have kept an unauthenticated copy. Refusal by the receiving party to produce those documents may also be suspicious if the judge has no doubt whatsoever that those documents were sent. An ordinary copy of a letter certainly does not constitute proof. But if a person submits an acknowledgment of receipt and declares the letter's contents, it would seem that the other party has an unquestionable obligation to submit the letter if he/she claims that its contents are different. If that other party does not submit the letter and maintains that he/she lost the letter, the judge may use said excuse as grounds for admitting the copy as true.

Obstructive conduct may sometimes occur in an active manner, for example, by destroying documents. The presumption arising from some acts of destruction of proofs is always unfavorable to the destroying party, assuming that an act of this nature must have been done for some reason. The logical inference is that it was done to eliminate something prejudicial to the author.[1]

1. Cf. L. MUÑOZ SABATÉ, *Técnica probatoria* (Barcelona 1967), p. 399.

1546 **§ 1. Nemo exhibere tenetur documenta, etsi communia, quae communicari nequeunt sine periculo damni ad normam can. 1548 § 2, n. 2 aut sine periculo violationis secreti servandi.**

§ 2. Attamen si qua saltem documenti particula describi possit et in exemplari exhiberi sine memoratis incommodis, iudex decernere potest ut eadem producatur.

§ 1. No one is obliged to exhibit documents, even if they are common, which cannot be communicated without danger of the harm mentioned in can. 1548 § 2 n. 2, or without the danger of violating a secret which is to be observed.

§ 2. If, however, at least an extract from a document can be transcribed and submitted in copy without the disadvantages mentioned, the judge can direct that it be produced in that form.

SOURCES: § 1: c. 1823 § 1
§ 2: c. 1823 § 2

CROSS REFERENCES: cc. 220, 983, 1527, 1548 § 2, 1550 § 2,2°

COMMENTARY

José María Iglesias Altuna

No one is obliged to present documents, even if they are common, which cannot be communicated without danger of harm, but it is clear that this harm can never consist in a risk that a party might lose the case. The harm must be unrelated to the case.

Under c. 1548 § 2,2°, which applies here, foreseeable harm is that which could arise from the presentation of a document that would cause a loss of reputation, dangerous mistreatment or other serious injury for oneself, one's spouse or one's close relatives by consanguinity or affinity.

Also, the danger of violating an obligation confidentiality which the clergy may be bound by virtue of having been entrusted to them in their sacred ministry legitimately excuses them from the obligation to submit documents, as it does civil court judges, physicians, midwives, lawyers, notaries public and others that are obligated to keep secrets as part of their duties, including any advice given that is related to that secret (cf. c. 1548 § 2,1°).

It is incumbent upon the judge to weigh the danger of that harm or disclosure of that secret in determining whether to admit an excuse that is claimed. In any case, if it is possible to transcribe and exhibit at least a part of the document without the dangers mentioned above, the judge may so order.

Evidence that is obtained by violating fundamental rights or freedoms is illegal and must therefore be rejected (cf. c. 1527). The right to obtain evidence, however respectable it may be, must not be carried to an extreme that allows the use of means of information obtained in a way that is unacceptable to the law or morality. No one may harm anyone's right to protect his or her privacy (cf. c. 220). The prohibition given in c. 1550 § 2,2° is the extreme of this requirement, which is also grounded on the sacramental seal (cf. c. 983): anything somehow overheard by anyone on the occasion of sacramental confession cannot be admitted, even as an indication of the truth.

CAPUT III
De testibus et attestationibus

CHAPTER III
Witnesses and Testimony

1547 **Probatio per testes in quibuslibet causis admittitur, sub iudicis moderatione.**

Proof by means of witnesses is admitted in all cases, under the direction of the judge.

SOURCES: c. 1754

CROSS REFERENCES: cc. 221 § 1, 1527

COMMENTARY

Juan José García Faílde

Canon 1547 begins chapter III, "Witnesses and Testimony," with this general principle: "Proof by means of witnesses is admitted in all cases, under the direction of the judge."

We all use other persons' testimonies in everyday life to learn facts that we do not know, but are interested in knowing. Accordingly, juridical systems, including the canonical system, accept testimony by witnesses as legitimate evidence in court, i.e., as a source that the judge may search for reasons that will help him settle the controversy.

We are not speaking here of witnesses required by law to validate an act, for example, such as witnesses that are required for the act of celebrating marriage to be valid, or the witnesses also required by law for the purpose of documenting an act: a notary public attesting to a will, for example.

Here we are speaking only of judicial witnesses that are physical persons, extraneous from the controversy, who are called to court and, in accordance with certain legal formalities, make statements on the facts related to the point in question in a case.

Judicial witnesses may be of several kinds: 1) *public or qualified*: public persons who attest to matters having to do with their (public) office; 2) *private*: non-public persons or public persons who are not attesting to acts falling within their (public) office; 3) *first-hand*: these witnesses testify that they know that an event happened because they perceived it with their own senses, i.e., by virtue of having seen (eyewitnesses) or heard (hearsay witnesses) said event, etc.; 4) *second-hand*: these witnesses testify that they know something through third parties; 5) *credulity*: these witnesses testify to something deduced by reasoning; *credible* witnesses are credulity witnesses that say they *think* that something has a certain quality (for example, that a certain person is credible, etc.); 6) *witnesses of rumors*: these witnesses only say they know something by neighborhood rumors, etc., and are unable to pinpoint the specific source of the rumors or give its objective basis; 7) *witnesses of repute*: these witnesses speak of common, solid, unanimous feeling about a fact at a given place; 8) *consistent witnesses*: two or more witnesses who agree on the substance of a fact; 9) *singular witnesses*: two or more witnesses, each of whom describes a fact differently. However these witnesses may be: *a*) *complementary*: if the facts described by each witness are different, but yet all complement each other in their presentation of a disputed fact: e.g., if one says he saw Peter plowing a farm, another adds that he saw Peter sowing the farm and still another says he saw Peter harvesting the crop at the same farm; all these facts work together to show that Peter is the farm's owner or legitimate usufructuary; *b*) *differing*: if one witness's testimony has nothing to do with another witness's testimony: e.g., if one says Peter sold John a car and another says Peter sold John a house; *c*) *opposing, adverse, contradictory*: if one witness's testimony is incompatible with another's such that if one version is true, the other must be false: e.g., if one witness says Peter was in city "z" at eight in the morning on day "x," and another says he saw Peter in city "m" at the same time on the same day.

It is not my place to comment on the relative theme of probative weight that, in general terms, is to be given to each type of witness mentioned above (cf. cc. 1572–1573).

It is common to call any response "testimony" or a "statement," even a monosyllabic or vague reply by a witness during a case, if given in accordance with legal formalities. But in fact, such replies are not true "testimony" or a "statement" if, in addition to having been made during a case in accordance with legal formalities, they contain no concrete facts or do not add the circumstances under which those facts occurred or the witness learned of those facts (how, when, where, etc.).

Although some call "experts" "witnesses," "technical witnesses" or "expert witnesses" and canonical legislation treats them as the same in certain aspects, witnesses and testimonies differ in no small way from experts and expert reports: "in testibus supponitur tantum rectus usus

sensuum et commune exercitium humanae rationis; in peritis vero specialis applicatio principiorum scientiae vel regularum artis requiritur."[1]

The same person may be a witness and an expert in a case, even though the purpose and function of one differs from those of the other.

In speaking of witnesses and testimonies, it must be remembered that for the judge, the main thing in the case is to find the objective truth, i.e., to arrive at moral certitude about the objective truth. Objective truth is incompatible with lies and also with error; truth is not veracity; truth is conformity of the judgment with reality; veracity is conformity of external appearance with internal opinion or feeling. As I have said, truth is the opposite not only of lying (which is the opposite of veracity and lack of ethical truth), but also of error (which is a lack of logical truth). A witness, then, must be not only sincere, but also truthful; a sincere person says what he/she knows, whether his/her knowledge is accurate or erroneous; a truthful person is one who knows the facts as they are and presents those facts sincerely (without lying) and without error. What a judge needs is truthful witnesses, because both a mistaken sincere witness and a mendacious witness would lead a judge to erroneous conclusions, to the detriment of justice.

There is no lack of circumstances that could keep a witness from being sincere: a witness may mistakenly believe that he is justified in lying because he thinks that lying would not only be of no harm to anyone, but would help a person in need of help, etc. There can be diverse psychological factors that can prevent a witness from being truthful, from perceiving reality, understanding perceived reality, remembering perceived understood reality, evoking memories faithful to remembered reality, or properly repeating and expressing reality, etc.[2]

From the foregoing, the trend of giving less and less weight to testimony is understandable. The *CIC* itself places evidence given by witnesses after documentary evidence, thereby implying that in principle evidence given by witnesses is less valid than documentary evidence.

The judge's "direction" under which c. 1547 places evidence given by witnesses is applicable in other canons of this chapter.

1. F. Roberti, *De Processibus*, II (Rome 1926), p. 80, no. 357.
2. Cf. J.J. García Faílde, "Criteria psychogologica ad aestimandas partium et testium declarationes in processibus ecclesiasticis," in *Periodica* 79 (1990), pp. 393–420.

1548 **§ 1. Testes iudici legitime interroganti veritatem fateri debent.**

§ 2. Salvo praescripto can. 1550 § 2, n. 2, ab obligatione respondendi eximuntur: (1) clerici, quod attinet ad ea quae ipsis manifestata sunt ratione sacri ministerii; civitatum magistratus, medici, obstetrices, advocati, notarii aliique qui ad secretum officii etiam ratione praestiti consilii tenentur, quod attinet ad negotia huic secreto obnoxia; (2) qui ex testificatione sua sibi aut coniugi aut proximis consanguineis vel affinibus infamiam, periculosas vexationes, aliave mala gravia obventura timent.

§ 1. Witnesses must tell the truth to a judge who lawfully questions them.

§ 2. Without prejudice to the provisions of can. 1550 § 2 n. 2 the following are exempted from the obligation of replying to questions:

1° clerics, in those matters revealed to them by reason of their sacred ministry; civil officials, doctors, midwives, advocates, notaries and others who are bound by the secret of their office, even on the ground of having offered advice, in respect of matters subject to this secret;

2° those who fear that, as a result of giving evidence, a loss of reputation, dangerous harassment or some other grave evil will arise for themselves, their spouses, or those closely related to them by consanguinity or affinity.

SOURCES: § 1: c. 1755 § 1; *PrM* 121 § 1
§ 2: c. 1755 § 2; *PrM* 121 § 2

CROSS REFERENCES: cc. 1527 § 1, 1528, 1455 § 3, 1562, 1598 § 1

COMMENTARY

Juan José García Faílde

The list given in § 2,1° is not exhaustive (others, such as pharmacists, etc., are included).[1] This is implied by the words "and others."

The obligation to tell the truth is violated not only by telling a falsehood, but also by concealing the truth.[2]

1. Cf. F. ROBERTI, *De Processibus*, II (Rome 1926), p. 43.
2. *Comm.* 15 (1984), p. 65. Canon 1755 § 1 CIC/1917 said so expressly.

But not everyone who is obligated to answer is obligated to tell the whole truth in their answer (which is not to say that they may legitimately lie). Persons covered under § 2 are "exempted" (dispensed) by the law itself from the obligation to answer if it involves secrets of office (but not other matters) and matters whose disclosure would result in grave harm to themselves or their relatives.

Persons covered by the phrase "without prejudice to the provisions of can. 1550 § 2" are not "exempted" (dispensed) from this obligation, properly speaking; rather, they cannot even be admitted as witnesses by virtue of the fact that they are juridically incompetent to be witnesses. The provisions given in c. 1548 § 2 excuse them from answering on certain matters, but they do not excuse them from appearing in a case as witnesses. On the other hand, the provisions mentioned in c. 1550 § 2 prohibit them from appearing as witnesses in a case.

In no case is a witness obligated to answer a judge truthfully if the judge asks "illegally" by virtue of the *judge* himself (if he is incompetent, for example), the *purpose* (if the question is irrelevant, for example, or if it involves something a witness must keep secret, etc.), or the *manner* (if a witness is asked a question in a place other than where said witness is to give testimony, for example, or if the question is deceptive, etc.).[3]

A witness who is "exempt" from the obligation to answer must inform the judge of the reason why he believes himself to be exempt from answering (c. 1557).

The secret mentioned in § 2,1° is the secret *of office* or a *professional* secret that has been "entrusted" in an express or tacit prior agreement to someone of that office or profession by virtue of that office or profession. A person who has been told something by someone for the purpose of obtaining advice rather than because of that person's office or profession falls under a secret similar to a professional secret that that person "is not obligated" to answer on such matters; rather, "the law exempts them" from answering on those matters. This means that if they had not been exempted by the law, they would have been obligated to answer on such matters.

The obligation to keep professional secrecy in a case is a requirement for the common good,[4] but this requirement for the common good ceases and a professional secrecy may be disclosed in a case if the person confiding that secret authorizes disclosure. The restrictive clause under which c. 1550 § 2,2° does not allow exemption from sacramental secrecy upon a penitent's request to disclose said secret in a case is not in c. 1548

3. Cf. J. NOVAL, *Commentarium Codicis Iuris Canonici, Libr. IV: De Processibus, Pars I. De iudiciis* (Turin-Rome 1920), p. 302, no. 434 and p. 326, no. 461; I. GORDON, *De iudiciis in genere, II, Pars dynamica.* Ad usum privatum (Rome 1972), p. 31, no. 130.
4. Cf. A.M. ARREGUI, *Summarium Theologiae Moralis* (Bilbao 1934), p. 252, no. 434.

§ 2,1°; therefore, as *Provida Mater* 121 § 2,1° expressly provided, I believe that professional secrecy is not binding in cases in which persons obligated to keep said secrecy "have been released by the interested parties from the obligation to keep the secret and prudently judge that they can testify."

Upon release from this obligation, a witness not only may, but must, inform the judge of what he or she knows that was covered by professional secrecy,[5] since he or she is now subject to the general rule given in c. 1548 § 1: "Witnesses must tell the truth to a judge who lawfully questions them."

There are also things that fall under other kinds of secrecy: *a*) secrets "confided" to someone, and agreed expressly or tacitly with someone as a private person (a friend, for example) before confiding in him or her; *b*) secrets "promised" by a person who received the confidence after giving the promise; *c*) and "natural" secrets required by the nature of the matter itself. Are witnesses obligated to answer truthfully when asked about matters falling under one of these secrets? The answer seems to be as follows:

a) There is no obligation to disclose what is known as a "confided" secret (*secretum commissum*), except when keeping the secret would result in grave public harm that could only be prevented by disclosing the secret;

b) There is no obligation to tell the truth about what is known as a "promised" secret (*secretum promissum*) or a natural secret.[6]

Both c. 1548 § 2,1° and c. 1550 § 2 mention "advocates," but the word is used with a different meaning in these two canons. In the first canon, it means an "advocate" subject to secrecy of office, and in the second canon, it means "advocate" in the sense of a litigant's assistant. What is said of the former is therefore different from what is said of the latter.

Paragraph 2, 2° mentions grounds that exempt a person from the obligation to answer a judge by virtue of the private good of the witness or of his relatives. The use of the term "closely related" in the *CIC* avoids determining the degree of consanguinity or affinity, thereby leaving that determination up to the prudent discretion of the judge.

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5. Cf. F.X. WERNZ-P. VIDAL-F.M. CAPPELLO, *Ius Canonicum. De Processibus* (Rome 1949), p. 417, no. 463. In this case, according to Cappello, the witness cannot do that unless the law or the public good require it: F.M. CAPPELLO, *Summa Iuris Canonici, III, De Processibus, delictis et poenis* (Rome 1948), p. 204, no. 242.

6. Cf. F.X. WERNZ-P. VIDAL-F.M. CAPPELLO, *Ius Canonicum...*, cit., p. 416, no. 463 with notes 22 and 23; M. LEGA-V. BARTOCCETTI, *Commentarius in iudicia ecclesiastica*, II (Rome 1950), p. 663, no. 5; S. GOYENECHE, *De Processibus*, Fasc. alter, pro manuscripto (Rome 1959), p. 38, no. 20.

ART. 1
Qui testes esse possint

ART. 1
Those Who Can Be Witnesses

1549 **Omnes possunt esse testes, nisi expresse iure repellantur vel in totum vel ex parte.**

Everyone can be a witness, unless expressly excluded, whether wholly or in part, by the law.

SOURCES: c. 1756; *PrM* 118

CROSS REFERENCES: cc. 221, 223

COMMENTARY

Juan José García Faílde

This canon contains one general principle and one exception.

The general principle is that anyone can be a judicial witness: men, women, the faithful, non-believers etc. This means that in principle, everyone is considered "competent" to testify in a case. Therefore, everyone is primarily considered "suitable" by virtue of their knowledge, "free of all suspicion" by virtue of their uprightness, and "competent" under the law. Admitting a person as a witness under this general principle shows a willingness to lend credence to that person and thereby honor him or her.

The exception is this: the only persons who cannot be witnesses are those who are expressly disqualified by natural or positive law, in whole (in all cases insofar as minors are concerned) or in part (for some cases, such as priests, on the grounds of being someone who was bound by professional confidences regarding the issue in dispute in said case).

Upon the appearance of a witness to be admitted, it is not necessary to prove positively that that witness is qualified, but in order to be automatically disqualified or to be disqualified upon formal petition, it is

necessary to prove positively that that witness cannot satisfy one of the requirements for admission as a witness, in any case in general or in a specific case in particular.

There is an obligation to automatically disqualify witnesses presented by parties if it is determined with certainty that the witnesses are prohibited from testifying in any case or at least in the case in question, except for the possibility of admitting witnesses who may be admitted in spite of being excluded by law, such as persons under fourteen and those of feeble mind (c. 1550 § 1).

1550 **§ 1. Ne admittantur ad testimonium ferendum minores infra decimum quartum aetatis annum et mente debiles; audiri tamen poterunt ex decreto iudicis, quo id expedire declaretur.**

§ 2. Incapaces habentur: (1) qui partes sunt in causa, aut partium nomine in iudicio consistunt, iudex eiusve assistentes, advocatus aliique qui partibus in eadem causa assistunt vel astiterunt; (2) sacerdotes, quod attinet ad ea omnia quae ipsis ex confessione sacramentali innotuerunt, etsi poenitens eorum manifestationem petierit; immo audita a quovis et quoquo modo occasione confessionis, ne ut indicium quidem veritatis recipi possunt.

§ 1. Minors under the age of fourteen years and those who are of feeble mind are not admitted to give evidence. They can, however, be heard if the judge declares by decree that it would be appropriate to do so.

§ 2. The following are deemed incapable of being witnesses:

1° the parties in the case or those who appear at the trial in the name of the parties; the judge and his assistant; the advocate and those others who in the same case assist or have assisted the parties;

2° priests, in respect of everything which has become known to them in sacramental confession, even if the penitent has asked that these things be made known. Moreover, anything that may in any way have been heard by anyone on the occasion of confession, cannot be accepted even as an indication of the truth.

SOURCES: § 1: cc. 1757 § 1, 1758; *PrM* 119 § 1, 120
§ 2: cc. 1757 § 3, 1974; *PrM* 119 § 3, 122

CROSS REFERENCES: c. 97 § 1

COMMENTARY

Juan José García Faílde

The entire probative value of a witness rests on the dual presumption of his/her *knowledge* and *veracity* with respect to the matter on which he/she is to testify. It is therefore necessary to exclude anyone from being a witness that likely or certainly has insufficient *knowledge* or *honesty* with respect to said matter or if a witness has knowledge and is honest, but may have a propensity to adulterate the truth (by virtue of a close relationship to one of the parties, for example, etc.).

The canon thus: 1) in principle, prohibits admitting as witnesses persons described in *CIC*/1917 as "incapable," i.e., children under 14 and the feeble-minded, on the presumption that they do not have sufficient awareness or knowledge; 2) considers witnesses juridically incapable (and such witnesses therefore cannot be admitted to testify) that are presumed to be susceptible to the danger of being partial or partisan (persons listed under § 2,1°), and persons juridically disqualified by virtue of public order on the grounds that admitting those persons would gravely harm public order if they revealed what they knew in a case because of the means by which they acquired that knowledge (these persons are listed § 2,2°).

The legislator prefers that children under 14 and the feeble-minded not be admitted to testify, without doubt because of their peculiar psychological condition. Canon 1757 *CIC*/1917, stating that children "who have not yet reached puberty" were excluded from testifying, gave rise to a debate on whether girls were being discriminated against in comparison with boys, since the children who had not yet reached puberty by 14 pursuant to c. 88 § 2 *CIC*/1917 were boys, whereas girls reach puberty at 12. This debate was resolved by the wording used in the new c. 1550 § 1. This general prohibition does not apply to persons over 14 testifying about something they learned with due capacity when they were under 14. The feeble-minded include not only those who are congenitally mentally impaired to a greater or lesser extent, but also those suffering mental deficiencies for any reason, such as senility, alcoholism, drug addiction, etc.

Does this cover the blind, the deaf and the mute? Not necessarily; it is obvious that being blind, for example, does not prevent a person from properly learning something by hearing. On the other hand, if a blind person is to testify about something whose perception is dependent upon the sense that person has lost, he/she could not be admitted to testify on this matter, assuming, of course, the event in question occurred after the person lost his sight.[1]

The canon allows a judge to admit such persons (children under 14 and the feeble-minded) to testify; however, it does not provide any guidelines at all for properly weighing testimony given by such persons that are admitted to testify. Canon 1758 *CIC*/1917 said that such persons' testimony would be taken only as an indication and accessory to the truth, which is to say that it would not have the weight proper to testimony in the strict sense, but would only be a sign, a harbinger or an indication, etc., of events, circumstances or details, which must be legitimately proved (as constituting an indicator), and the value of an accessory, i.e., a

1. Cf. M. LEGA-V. BARTOCCETTI, *Commentarius in iudicia ecclesiastica*, II (Rome 1950), p. 669, no. 4 *sub* d; F.X. WERNZ-P. VIDAL-F.M. CAPPELLO, *Ius Canonicum. De Processibus* (Rome 1949), p. 419, no. 466, *sub* b; S. GOYENECHE, *De Processibus*, Fasc. alter, pro manuscripto (Rome 1959), p. 41, no. 24.

reinforcement or an auxiliary to other elements of proof, in order to be given more weight.[2]

It would be appropriate, then, to give some psychological considerations that could be used to weigh such testimony properly:

1. Children under 14: *a*) In general, children are willing to testify sincerely and objectively; *b*) they also have a good ability to observe and remember; but *c*) they have imaginations so lively as to lead them to invent more or less likely events and to give only subjective interpretations of events they cannot understand; *d*) they easily fall victim and are highly susceptible to suggestions from others and of their own; *e*) they lack due perseverance and due consistency; they lack the ability to concentrate, i.e., they cannot focus their attention on a single topic for a long time; *f*) their judgment is so weak that only with great difficulty do they understand the importance and consequences of their testimony; *g*) to which should be added their difficulty, at times perceptible, in expressing exactly what they know;

2. The feeble-minded: It will suffice to mention their frequent lapses of attention, memory, critical judgment, sense of responsibility, etc.; their susceptibility to suggestions from others and of their own; their proclivity to become upset upon interrogation, etc.

Canon 1550 § 1 itself assumes that persons over 14 that are not feeble-minded are competent witnesses solely by virtue of having come of age and having no mental deficiencies. However, no one is blind to the fact that such a huge group of people includes many kinds of persons with different psychologies. From the psychological point of view, for example, suffice it to mention how different a teenager, a young adult and an elderly person are, etc.; and each of these age groups comprises a diversity of temperaments, some being serious thinkers and others being shallow, some observant and others distracted, some meticulous and others unfocused, some are detail-oriented and others are not, some extreme and some moderate, some are chronic liars, etc.[3]

Parties to a case and their proxies, such as the parties' curators or procurators may not be witnesses in the same case, for the reason that a witness must be unrelated to the case. Also, judges and their assistants in a case may not be witnesses in the same case, since a witness must be someone other than court personnel. Judges' assistants include auditors or instructors, assessors, notaries, etc.

Persons who assisted either party to a case, such as advocates or procurators, etc., may not be witnesses in the same case, either. This does not apply to persons who, in their capacity as advocates, for example,

2. Cf. L. DEL AMO, *Valoración de los testimonios en el proceso canónico* (Salamanca 1969), pp. 43–44.

3. Cf. J.J. GARCÍA FAÍLDE, *Manual de psiquiatría forense canónica* (Salamanca 1991), p. 447.

assisted either party before the case was introduced or to persons who, in their capacity as advocates or procurators, for example, assisted either party in other cases. If by virtue of having done so, an advocate or procurator learns something under the shield of professional secrecy, they may be excused under c. 1548 § 2,2°, from having to testify thereon in that other case.

When I mention "cause" here, I mean any instance of a case, so that judges and their assistants and the advocates and procurators who provided assistance to either party in a case not only cannot be witnesses in the instance of the case in which they are or were judges or court personnel or are or did assist either party; neither can they be witnesses in the supplementary instruction at another instance (the appeal, for example, of the same case).[4] If in fact any of those persons do testify in that case in spite of their juridical incompetence to do so, their testimony shall have no probative value. However, it seems to me that such persons would not be incompetent to give testimony in a case in which they had served as a judge, etc., on the procedure that was followed in the case or on records of the case in the event, for example, that either party questions those procedures or records.

Accordingly, c. 1550 § 2,2° stipulates that a priest is incompetent to testify about what he has learned in confession, etc.; I say "about what he has learned in confession" and not only about any "sins" that may have been confessed to him. In this regard, anyone else who learned anything said at confession, such as interpreters or someone who overheard, shall be considered the same as the confessor.

Confessors may not testify on what they have learned in confession even if a penitent requests a confessor to serve as a witness to testify on what was learned in confession. Such requests by a penitent would amount to a release from the sacramental seal, which, in the common opinion of theologians, cannot be done by penitents.[5] It is clear, however, that anyone who is or has been confessor to either party may be called as a witness to testify on matters learned by that witness outside confession.

Testimony given in violation of the prohibitions contained in c. 1548 § 2 and c. 1550 § 2 shall be illegal and thus inadmissible (c. 1527 § 1).

The autonomous term "suspect" witnesses has been removed from the new *CIC* (cf. c. 1757 § 2 *CIC*/1917), but this does not prevent one party from objecting to a witness on the grounds of any of the reasons that would have made that person a "suspect" witness in the past, such as public and grave enmity toward that party.

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4. Cf. *coram* JULLIEN, January 12, 1935, in *SRR Dec* 27 (1935), p. 19.
5. Cf. *Comm.* 11 (1979), p. 110; J.J. GARCÍA FAÍLDE, *Nuevo Derecho Procesal Canónico, Estudio sistemático-analítico comparado* (Salamanca 1992), p. 150.

ART. 2
De inducendis et excludendis testibus

ART. 2
The Introduction and the Exclusion of Witnesses

1551 **Pars, quae testem induxit, potest eius examini renuntiare; sed adversa pars postulare potest ut nihilominus testis examinetur.**

A party who has introduced a witness may forego the examination of that witness, but the opposing party may ask that the witness nevertheless be examined.

SOURCES: c. 1759 § 4; *PrM* 132 § 1

CROSS REFERENCES: c. 1524

COMMENTARY
Juan José García Faílde

This has to do with renouncing the future examination of a witness (not the rejection of a witness) introduced by the renouncing party (not renouncing the examination of witnesses introduced by the opposing party, the defender of the bond or the judge).

It could be argued that the party that introduced the witness has the right to renounce examining that witness and the consequent duty of the judge to admit such a renunciation even if the opposing party requests that the witness be examined, but it must not be forgotten that the opposing party has acquired a right (by virtue of the procedural relationship created between the parties and between the parties and the judge) that can be enforced, in spite of renunciation, by demanding that the witness who might be favorable to the opposing party be examined.

It is quite another matter whether a judge is necessarily obligated to grant the renouncing party's petitions more readily than the opposing party's petitions or vice versa. It is reserved to the judge to grant, at his free discretion, either party's petitions, depending on the weight given to the parties' reasons.

1552 **§ 1. Cum probatio per testes postulatur, eorum nomina et domicilium tribunali indicentur.**

§ 2. Exhibeantur, intra terminum a iudice praestitutum, articuli argumentorum super quibus petitur testium interrogatio; alioquin petitio censeatur deserta.

§ 1. When proof by means of witnesses is sought, the names and domicile of the witnesses are to be communicated to the tribunal.

§ 2. The propositions on which the interrogation of the witnesses is requested, are to be submitted within the time-limit determined by the judge; otherwise, the request is to be deemed abandoned.

SOURCES: § 1: c. 1761 § 1; *PrM* 125 § 1
§ 2: c. 1761; CodCom Resp. IV, 12 mar. 1929; *PrM* 125 § 2

CROSS REFERENCES: cc. 1432, 1452 § 2, 1465 § 2, 1526 § 1, 1533, 1561, 1564, 1565

COMMENTARY

Juan José García Faílde

Canon 1761 *CIC*/1917 provided that if the names and addresses of witnesses and the matters about which they are to be examined are not given in the petition for evidence, the judge was to give the petitioner a deadline for providing that information, and if the petitioner did not do so, the petition was to be considered abandoned (but this did not preclude the judge from admitting the petition with just cause upon being resubmitted again).

Provida Mater 125, substantially echoed c. 1761 *CIC*/1917, omitting the clause mentioning withdrawal of the petition.

The new c. 1552 also omits this clause with respect to giving names and addresses of witnesses, but not with respect to giving the matters on which those witnesses are to be examined. However, if a party does not give the witnesses' names and addresses upon submitting a petition for evidence, I do not see any reason preventing the judge from giving that party a deadline for submitting this information and a warning that the petition will be considered abandoned if the deadline is not met.

The need to indicate witnesses' names and addresses for citation purposes is clear, as is the need to submit the matters on which witnesses are to be examined, at least if the witnesses are to be useful (cf. c. 1527 § 1).

1553 **Iudicis est nimiam multitudinem testium refrenare.**

It is for the judge to curb an excessive number of witnesses.

SOURCES: c. 1762; *PrM* 123 § 2

CROSS REFERENCES: cc. 1527, 1547

COMMENTARY

Juan José García Faílde

The effectiveness of witnesses does not lie in a greater or lesser number of witnesses, but rather in the greater or lesser weight given them. Many witnesses may prove nothing if, for example, they are not credible, do not say anything or do not say anything other than insignificant things, etc. On the other hand, a small number of witnesses may prove much if, for example, they are truthful and describe specific things they witnessed that are relevant to the case, etc.

A judge, at his discretion, may determine when the number of witnesses introduced is excessive, based on the witnesses' quality and the seriousness of the matter.

There is no appeal against a judge's decree limiting the number of witnesses,[1] since obviously this decree is not a final sentence and neither hinders nor terminates proceedings in any other grade of the process (c. 1618 in connection with c. 1629,4°).

It could be argued that a litigant who disagrees with the limiting of his/her witnesses can make us of the well-known issue of "right to appeal" (c. 1631), since such limitation is equivalent to excluding the witnesses that are not admitted. However, a judge in fact is not excluding any witness, but rather ordering a party to exclude the witnesses he/she wants and although it is the judge that excludes those witnesses because he considers them useless or superfluous, if a party urges the judge to admit a denied testimony, the judge would have to decide the petition "with maximum expedition" (c. 1527) and this decision would not be able to be appealed (c. 1629,5°).

1. Cf. J. NOVAL, *Commentarium Codicis Iuris Canonici, Libr. IV: De Processibus, Pars I. De iudiciis*, (Turin Rome 1920), p. 334, no. 477.; S. GOYENECHE, *De Processibus*, Fasc. alter, pro manuscripto (Rome 1959), p. 45, no. 25, II.

1554 **Antequam testes examinentur, eorum nomina cum partibus communicentur; quod si id, prudenti iudicis existimatione, fieri sine gravi difficultate nequeat, saltem ante testimoniorum publicationem fiat.**

Before witnesses are examined, their names are to be communicated to the parties. If, in the prudent opinion of the judge, this cannot be done without great difficulty, it is to be done at least before the publication of the proofs.

SOURCES: c. 1763; *PrM* 126

CROSS REFERENCES: cc. 1555, 1598 § 1

COMMENTARY

Juan José García Faílde

The purpose of giving notification of the names is to give the parties an opportunity to object to any of them. However, c. 1555 does not seem to authorize any such objection once a witness has given testimony. If, in fact, notification of names is given after the witnesses give their testimony, which is allowed under c. 1554, can the right to object be exercised?

According to c. 1765 *CIC*/1917, the obligation to give notification of the names was incumbent upon the litigants, but the new c. 1554 implies that it is the judge who decides whether he will give notification or the parties will do so. The judge has the power to decide that notification of the names not be given before the witnesses are examined if he believes it cannot be done before they give their testimony without great difficulty, such as the danger, for example, that the opposing party might try to prevent a witness from telling the truth by threatening reprisals or offering bribes, etc.

If a witness only agrees to give testimony on the condition that his name not be given to one or both parties, a judge may agree and keep that witness's name confidential.[1] *Provida Mater* 130 § 2 seems to say the same thing. By analogy, the new c. 1598 § 1 on the judge's power not to

1. Cf. F.M. CAPPELLO, *Summa Iuris Canonici*, III, *De Processibus, delictis et poenis* (Rome 1948), p. 215, no. 258 bis; I. GORDON, *De iudiciis in genere, II, Pars dynamica.* Ad usum privatum (Rome 1972), p. 63; J.M. PINNA, *Praxis Judicialis Canonica* (Rome 1952), p. 65.

reveal to anyone a given procedural act in cases involving the public good in order to avoid very serious dangers may also apply. But as c. 1598 § 1 expressly states, even in this case, "the right of defense [must] always remain intact." Consequently, if notification of that act is not given to anyone, anyone whatsoever, and if that act is important to the case and influences the decision in the case, I do not see how this right of defense can be kept intact, unless the judge foregoes using it to reach his decision and to decide the case.

If it is only one or both parties to whom no notification of the act is given, then keeping the act secret might, in principle, be compatible with keeping the right of defense intact in a case in which the act has weight with respect to the decision and the judge uses it in reaching his decision if the judge discloses the act to the respective advocate/procurator, requiring that advocate/procurator swear that he will keep the act secret as *Provida Mater* 130 § 1 mentioned above would seem to suggest. However, can an advocate/procurator keep that act secret, under oath, from his client? Can advocates/procurators submit valid evidence refuting what a secret witness would say if the advocates/procurators do not tell their client that the witness is going to testify? In this case, can advocates/procurators lawfully exercise a hypothetical objection to the witness?

There is another issue: is there an obligation to notify a party of items submitted by the other party for the judicial examination of its witnesses?

The canons do not say anything about this. But with respect to a certain custom influenced by civil procedure that is followed in some places, the CPI responded on March 12, 1929, that this practice could continue so long as it does not involve the danger of bribes.[2] This notification may then be continued by avoiding this or similar dangers.

In certain Spanish ecclesiastical curias, influenced by the civil forensic system, a second interrogatory by the opposing party is still being admitted in order to refute the answers to the first interrogatory. I want to point out that the more helpful a second interrogatory is, the more it contributes to ascertain, facilitate and ensure the truthfulness of testimony. But usually, second interrogatories produce the opposite effect by precluding, complicating or obscuring the truth by virtue of the judge's passivity, or by conducting the second interrogatory not by cross-examination on each fact and circumstance, but by repeating the examination, first in the initial interrogatory, without interruption, and then in a second interrogatory, also without interruption.

2. Cf. E.F. REGATILLO, *Interpretatio et Iurisprudentia Codicis Juris Canonici* (Santander 1949), p. 520, no. 695.

1555 **Firmo praescripto can. 1550, pars petere potest ut testis excludatur, si iusta exclusionis causa demonstretur ante testis excussionem.**

Without prejudice to the provisions of can. 1550, a party may request that a witness be excluded, provided a just reason for exclusion is established before the witness is examined.

SOURCES: c. 1764; *PrM* 131

CROSS REFERENCES: cc. 1451 § 1, 1550, 1551, 1629,5°

COMMENTARY

Juan José García Faílde

This canon, then, provides that the exclusion of other witnesses may be requested by the parties and excluded by the judge in addition to witnesses who are legally not admitted because they are unfit or incapable under c. 1550, and who must be excluded either ex officio as provided under c. 1764 § 1 *CIC*/1917 or at the initiative of either party or tribunal officials who are allowed to do so by law.

An objection is not to be confused with *exclusion*: *objection* is an exception against a witness by one party that is made so that the judge will exclude that person from serving as a witness. *Exclusion* is an act whereby a judge prohibits a witness from giving testimony.

The objection of a witness is a type of exception which seems to be akin to a dilatory and preemptory exception.

Canon 1764 §§ 2 and 3 *CIC*/1917 distinguished two types of objections of a witness: a motion by one party against a witness introduced by the opposing party (§ 2) and a motion by one party against one of his/her own witnesses (§ 3). This second type of objection is totally different from the type of objection provided under c. 1754 § 4 *CIC*/1917, which consisted of foregoing the examination of a witness by the party that introduced the witness.

Canon 1555 does not expressly mention these two types of objection (although the objection it mentions is clearly different from renouncing the examination of a witness as mentioned under c. 1551). But c. 1555 uses wording that is broad enough ("a party may request that a witness be excluded") to cover both types of aforementioned objections, i.e., the

objection by one party to the other party's witness and the objection by one party to his/her own witness.

The same requirements apply to either type of objection, i.e., showing just cause for the objection before the witness is judicially examined (c. 1555); it is no longer necessary that the cause of objection occur afterward for a party to object to his/her own witness. The former legislation did not consider it enough to allege that the cause existed at the time the witness was introduced, but that the party was unaware of it (c. 1764 § 3 *CIC*/1917 and *PrM* 132 § 2).

Exception of suspicion against a witness may arise from many reasons, which the canon does not list, but leaves to the prudent discretion of the judge (the canon only says that it has to be a just cause). It is incumbent upon the objecting party to allege and prove that cause within the time limit set by the judge before the witness is examined, but it is for the judge to determine whether or not a just cause exists.

Some such causes are given below:

a) fervent interest in favoring or harming one of the parties;

b) the witness has been coached and prepared in advance;

c) the witness has been bribed with gifts, promises, etc.;

d) the witness is a servant, aide or subordinate of one of the parties and likely does not have the freedom or liberty to give testimony against his employer, supervisor or superior. These witnesses are not suspect by virtue of being servants, etc., but this does not prevent a party from rejecting them on the grounds that said witnesses may be influenced by virtue of affection, economic dependency, subordination at work, etc.

Canon 1555 says that disqualification may only be proposed if a just cause is shown before the witness testifies. Objection of a witness, then, would not be possible on the grounds of a cause that occurs after the witness has testified or a cause that existed before, but was alleged and shown after the witness testifies. What reason would there be for requiring that a just cause for disqualification be shown prior to examining the witness if the argument, assuming it were allowed, and resolution thereof could take place *after* the witness testifies? I believe, then, that the intent of this new canon is that this hypothetical argument and resolution should take place *before* the witness testifies (a radical change has taken place in this matter since earlier legislation: see c. 1764 *CIC*/1917 and *PrM* 131). This is consistent with the fact that the *CIC* Preparatory Commission considered it unnecessary (it being obvious) to retain the paragraph reiterating that the argument (and thus the ensuing resolution thereof) on disqualification must take place *prior* to the findings in the cause,[1] since the requirement that the argument and resolution of disqualification *prior*

1. Cf. *Comm.* 11 (1979), p. 112.

to the findings in the cause is not having to make that argument/resolution *after* a witness has been heard in the case. The following sequence could easily happen: the argument, if admitted, is heard and the issue of disqualification is settled; if the witness is not disqualified, that witness is examined; and the findings in the case are handed down at a later date.

The decision, whether affirmative or negative, made on this matter by the judge cannot be appealed, since it is analogous to a decision settling the objection of a judge (c. 1449 § 1), and that decision, which should be made with maximum expedition (c. 1451 § 1) cannot be appealed (c. 1629,5°).

1556 **Citatio testis fit decreto iudicis testi legitime notificato.**

The summons of a witness is effected by a decree of the judge lawfully notified to the witness.

SOURCES: c. 1765

CROSS REFERENCES: cc. 1507 § 4, 1509

COMMENTARY

Juan José García Faílde

A citation is not an "invitation," but an "order" to appear in court.

A citation must be decreed by a judge and lawfully served in terms of c. 1509. The citation decree must contain the citation itself, the name of the judge ordering the citation, the full name and address of the person being cited, the reason (at least in general) for the citation, and the names of the petitioner and respondent (c. 1715 *CIC*/1917).

The fact that c. 1557 orders a witness who is legitimately excused to notify the judge of the reason for not appearing assumes that a witness is informed upon being cited of the matter on which the witness will be judicially examined.

In order to inform a witness about the cause in general terms, it is obviously not necessary to provide the witness with the specifics he/she will be asked upon examination. Canon 1565 § 1, in principle, prohibits informing a witness, before he testifies, of the formulation of the "interrogatories." Cardinal M. Lega, distinguishing between "interrogatories" and "questions" or "queries," was inclined to hold that the law allowed informing a witness of questions or queries before the witness was examined, but prohibited informing witnesses of "interrogatories"[1] before the examination. However, whatever the practice may have been in the past, the terms "questions," "queries" and "interrogatories" are used interchangeably today.[2]

Anything that might "instruct," "forewarn," "prepare" or "coach," etc., a witness so as to make a witness "suspect" must be avoided, as well as anything that taints one's memory or testimony or obligates one in one

1. Cf. M. LEGA-V. BARTOCCETTI, *Commentarius in iudicia ecclesiastica*, II (Rome 1950), p. 692, no. 2.

2. Cf. I. GORDON, *De iudiciis in genere, II, Pars dynamica.* Ad usum privatum (Rome 1972), p. 32; F. ROBERTI, *De Processibus*, II (Rome 1926), p. 20, no. 321 and p. 62, no. 347.

way or another to say what is wanted, etc., rather than what one knows. The most that can be allowed in this regard is what is permitted under c. 1565 § 2: that is to say, if the facts on which a witness is to testify are so remote that testimony could not reliably be given without first refreshing the memory, the judge may "prepare" a witness on some points if the judge believes he can do so with no risk, such as subornation, etc., for example, but this is to be done at the time testimony is taken, not when a witness is cited.

Omission of lawful summons of a witness may be remedied by the spontaneous appearance of the witness under c. 1711 *CIC*/1917, and as may be seen, by analogy with cc. 1507 § 3 and 1512 *CIC* on the appearance of a litigant who was not lawfully summoned. The witness cannot be qualified as a spontaneous witness by virtue of a spontaneous appearance, since a spontaneous witness or a witness that offers to testify without being introduced as a witness is not the same as a witness introduced as such who appears to testify without having been cited.

A witness that has not been lawfully cited has no obligation to appear or to justify not appearing (c. 1577).

1557 **Testis rite citatus pareat aut causam suae absentiae iudici notam faciat.**

A properly summoned witness is to appear, or to make known to the judge the reason for being absent.

SOURCES: c. 1766 § 1; *PrM* 127 § 1

CROSS REFERENCES: cc. 1548, 1549, 1550

COMMENTARY

Juan José García Faílde

This obligation to obey is an obligation to appear in court, with the understanding that a witness must appear to give testimony (which is not the same thing as telling the whole truth, which I shall cover below).

This obligation flows from the fact that the public good requires an unexcused qualified witness to lend assistance so that justice may be administered correctly.

Witnesses that are incapable under c. 1550 § 2 do not have this obligation to obey by appearing and testifying in court, even if summoned to do so. Witnesses considered incapable under cc. 1550 § 1 and 1548 (whether the witnesses mentioned under c. 1548 are or are not obligated to tell the whole truth is another issue), when lawfully cited, and all other witnesses who are not excluded (cf. c. 1549), have this obligation to appear and testify in court, although they may have a reason (such as, for example, illness, a trip already planned that cannot be rescheduled, etc.) that would excuse them from appearing at the appointed place, date and time.

In any case, a witness who is excused from appearing or answering questions must inform the judge of the reason why he/she believes he/she is excused from appearing or from answering questions.

The faculty conferred upon a judge under c. 1766 § 2 *CIC*/1917 to punish a witness that fails to appear for no lawful reason or who appears and then refuses to answer questions no longer exists.

ART. 3
De testium examine

ART. 3
The Examination of Witnesses

1558 **§ 1. Testes sunt examini subiciendi in ipsa tribunalis sede, nisi aliud iudici videatur.**

§ 2. Cardinales, Patriarchae, Episcopi et ii qui, suae civitatis iure, simili favore gaudent, audiantur in loco ab ipsis selecto.

§ 3. Iudex decernat ubi audiendi sint ii, quibus propter distantiam, morbum aliudve impedimentum impossibile vel difficile sit tribunalis sedem adire, firmis praescriptis cann. 1418 et 1469 § 2.

§ 1. Witnesses are to be examined at the office of the tribunal unless the judge deems otherwise.

§ 2. Cardinals, patriarchs, bishops, and those who in their own civil law enjoy a similar favour, are to be heard at the place selected by themselves.

§ 3. Without prejudice to the provisions of cann. 1418 and 1469 § 2, the judge is to decide where witnesses are to be heard for whom, by reason of distance, illness or other impediment, it is impossible or difficult to come to the office of the tribunal.

SOURCES: § 1: c. 1770 § 1
§ 2: c. 1770 § 2,1°; *PrM* 98 § 1
§ 3: c. 1770 § 2,2°–4°; *PrM* 98 § 2; SCDS Regulae, 7 maii 1923, 24 § 1

CROSS REFERENCES: cc. 1418, 1437, 1468, 1469

COMMENTARY

Feliciano Gil de las Heras

The general norm of this canon is that witnesses are to be heard at the office of the tribunal. It is the witnesses that are to go to the judge, not the judge who is to go to the witnesses. The reason for this norm is simple common sense. The norm thus does not suffer the inflexibility of nullity if it is not followed. The proof of this is the number of exceptions mentioned in the canon itself. And many of these exceptions are because the general norm itself is not practical in certain concrete cases. Thus § 1 of the canon says "unless the judge deems otherwise" when it would be practical not to follow the general norm.

This general norm extends both to witnesses in the judge's area of jurisdiction and those outside his area of jurisdiction. The general norm is to prevail in either case, unless the judge deems otherwise. Cases in which a judge may opt for a solution other than summoning witnesses to the office of his tribunal may be quite varied. We cannot list all of them here, but we will take time to discuss a few of them, beginning with the cases expressly mentioned in the Code of Canon Law.

a) The first exception to the general norm is seen in the words of § 1 of this canon: "unless the judge deems otherwise." It has been left to the judge's prudence and discretion to elect the best solution in a given case. The judge is to exercise this discretion by taking into account the general norm, the exceptions made by the legislator and the *ratio legis* of the norm.

b) Paragraph 2 of this canon mentions another exception, which has to do with the place where cardinals, bishops and others enjoying this favor are to be heard, depending on each nation's law. These persons have the right to choose the place where they are to be heard.

This exception to the general norm for eminent persons derives from Roman law.[1] It is based on consideration the legislator chooses to show for persons of a certain eminence or authority.

The norm does not distinguish here between diocesan and titular bishops (c. 376), so neither are we to make any such distinction, and we may say that both diocesan and titular bishops enjoy this privilege. The reason is that both have the same episcopal dignity. If no adjective is used with the word "bishop" in the Code of Canon Law, titular bishops are to be included (cc. 377, 749 § 2). If a diocesan bishop is to be understood as opposed to a titular bishop, the canons expressly say so (c. 381), and when no adjective is used, both are intended (c. 1405 § 1,3° § 3,°).

1. Cf. A. REIFFENSTUEL, *Ius canonicum universum*, L. II, tit. XX, no. 506.

Nor should this explanation be considered as a broad interpretation of a norm containing an exception that should be strictly interpreted (c. 18); rather, the exception covering titular bishops is stated in the positive norm itself.

We also understand that the exception extends to persons who are "equivalent in law to diocesan bishops," such as territorial prelates (cc. 370ff), personal prelates (cc. 294ff), territorial abbots, and apostolic vicars presiding over a permanently established prefecture (cc. 381 § 2 and 368). Given the dignity of these persons, it would not seem decorous to summon them to a tribunal office.[2]

Canon law accepts the privilege granted to certain persons under civil law in their jurisdiction, as well as any limits imposed by civil law on this privilege.

c) The third exception to the general norm is seen in § 3 of the canon. It mentions persons for whom "by reason of distance, illness or other impediment, it is impossible or difficult to come to the office of the tribunal." But this does not mean that these persons can choose the place. Here the exception is that the judge can determine where they will be heard, which may be somewhere other than the office of the tribunal. These exceptions have to do with persons in the diocese that meet these conditions. For persons outside the judge's diocese, cc. 1418 and 1469 must be followed.

In specific cases of physical or moral impossibility, it is the judge who must determine whether the physical or moral impossibility is sufficient so one is not obligated to appear at the office of the tribunal. The difficulty may be physical, spiritual or moral. It is not possible to list here all the different cases that might arise. But in all these cases, it is the judge and notary who will go to the place selected by the judge to examine these witnesses.

A case might also arise in which it would be greatly inconvenient either for the witnesses to go to the office of the tribunal or for the judge to go to the witnesses by virtue of distance, even if the witnesses reside in the judge's jurisdiction. The current Code of Canon Law, unlike *CIC*/1917, does not address this situation. The option of a delegated judge, even though a near-by priest who is reliable and capable is recommended, does not quite seem satisfactory, since the examination of witnesses requires juridical knowledge. This is an extreme solution that might be more frequently used in mission countries. In any case, the delegating judge in these cases must appoint a person to serve as a notary or authorize the delegated judge to appoint a notary. Without a notary, the testimony could be challenged on the grounds that no notary was present.

2. Cf. M. LEGA-V. BARTOCETTI, *Comentarius in iudicia ecclesiastica*, II (Rome 1950), p. 700, no. 2.

As can be seen, there must be a reason for a judge to travel outside his jurisdiction to hear witnesses. However, even if there is no reason, such hearings by a judge would still be valid. The liciety or illiciety would depend on any unnecessary harm caused to the parties or other concrete circumstances. An exception is based precisely on the existence of a cause that makes it reasonable for a judge to travel to another location outside his jurisdiction.

Witnesses residing outside a judge's territorial jurisdiction may be summoned to the office of a tribunal under the general norm. A judge may hear witnesses of any kind in his jurisdiction. However, if witnesses cannot appear for any of the reasons given or other reasons or if witnesses are unwilling to travel because of great distance or other reasons, it should be remembered that c. 1418 prescribes that "every tribunal has the right to call on other tribunals for assistance in instructing a case or in communicating acts." This norm is useful under the principle that a judge does not have jurisdiction outside his territory: *extra territorium ius dicenti non paretur.*

An *a quo* tribunal's right is coupled with an *ad quem* tribunal's obligations. It is not a matter of courtesy. Rights and obligations are correlated.

The principle of mutual assistance among tribunals has been developed over time. *CIC*/1917 was a great step forward compared to earlier discipline.[3] The *CIC* 1983 also contains innovations of great usefulness in this area. This principle should be extended to assistance between civil tribunals and ecclesiastical tribunals, at least in certain areas.

Under the right every tribunal has to request assistance from another tribunal in order to investigate a case, one tribunal sends a formal request or rogatory letters to another tribunal, depending on whether the tribunals are of equal grade or whether a higher court is dealing with a lower court or vice versa. The necessary interrogatories are sent attached to these letters, and a judge is limited to complying with the concrete instructions contained in these respective letters. This judge shall never be entrusted with the entire case. Witnesses, in this case, shall be heard in the office of the tribunal of the territory where they live.[4]

In reality, this is a delegation in this case that is given to the judge that is to hear the witnesses. There is no doubt that this judge is also delegated to ask the witnesses any questions he/she deems necessary.

The judge must also take into account that sometimes one party may prefer that the witnesses testify before the judge that is hearing the case, claiming that the opposing party is trying to delay the case with rogatory

3. Cf. F. ROBERTI, *De processibus*, I (Rome 1941), pp. 243ff.
4. Cf. F. ROBERTI, *De processibus*, II, cit., p. 58.

letters. An incident would thus arise that the judge himself would have to resolve (cf. *PrM* 98 § 2).

d) The case mentioned in c. 1469 in which a judge is forcibly expelled from his territory or prevented from exercising jurisdiction in his territory might also be considered an exception to the general principle, although it is more properly an exception to the general principle that a judge can only exercise jurisdiction in his own territory.

e) Canon 1469 § 2 contains a true exception. It may sometimes be of great importance that a judge travel outside his territory to gather evidence and specifically to hear witnesses who cannot or do not wish to appear at the office of the tribunal. This may be demanded by the principle of immediacy. This canon prescribes that a "judge, for a just reason and after hearing the parties, can go outside his own territory to gather proofs. This is to be done with the permission of, and in a place designated by, the diocesan bishop of the place to which he goes."

The canon does not distinguish among types of evidence, so we are to understand that all evidence, including testimony, is included. In this case, it is understood that the existence of a just cause and permission of the diocesan bishop of the place where the judge goes are not required in order for a judge's actions to be valid. We consider this new canon in the Code of Canon Law to be of major importance. The diocesan bishop's permission is necessary, because excessive abuses would occur otherwise. We do not venture to say that actions taken by a judge without just cause outside his territory, without permission from the diocesan bishop, would be null and void under cc. 10 and 39. Nor are these requirements components of such an action. But we do state with certainty that evidence thus collected would be illicit and therefore ineffective. Otherwise, the norm would be useless for preventing abuses. The canon specifies various circumstances, which indicates the legislator's interest in the compliance with and importance of the norm.

It is well known that the Tribunal of the Rota of the Nunciature in Spain can travel to any location in the country to examine witnesses under its own norms (art. 37). Further, this same article prescribes that the "the ponens or instructor shall examine the witnesses, and the granting of rogatory letters for a non-Rota judge to examine witnesses shall not be given easily." The judge hearing the case knows the problems involved and is better qualified to ask ex officio questions as he deems necessary. In the event of an appeal, there may be additional reasons, since there may be more problems if a request is sent to the same judge that made the decision being appealed.

f) Testimony by witnesses over the telephone may in some way be considered an exception to the general norm. It is not expressly mentioned in the canon. The codifiers expressly discussed this issue when preparing the *CIC*. The telephone is not expressly prohibited, but neither

did the commission insert it into the canon. And the reason given was that such a norm might lend itself to abuse and doubts might arise over witnesses' identity, freedom, etc. It was expressly said that testifying by telephone was not prohibited in the canon.[5] We would only accept it in highly unusual cases of extreme necessity and would take the precautions necessary to avoid the dangers entailed therein.

5. Cf. *Comm.* 11 (1979), p. 114.

1559 **Examini testium partes assistere nequeunt, nisi iudex, praesertim cum res est de bono privato, eas admittendas censuerit. Assistere tamen possunt earum advocati vel procuratores, nisi iudex propter rerum et personarum adiuncta censuerit secreto esse procedendum.**

The parties cannot be present at the examination of the witnesses unless, especially when there is question of a private interest, the judge has determined that they are to be admitted. Their advocates or procurators, however, may attend, unless by reason of the circumstances of matter and persons, the judge has determined that the proceedings are to be in secret.

SOURCES: c. 1771; *PrM* 128; CPAC Rescr., 28 apr. 1970, 13

CROSS REFERENCES: cc. 1534, 1559, 1663, 1678

COMMENTARY

Feliciano Gil de las Heras

1. As the far as the parties' presence at the witnesses' examination is concerned, the general norm of the canon is that the parties cannot appear. There is no doubt that there are arguments for and against the parties' presence during the examination of witnesses. This is why the parties were summoned to hear witnesses' testimony under the former decretal law in criminal cases, why witnesses were not allowed to be present when written law was introduced, and why the authors were not in agreement as far as contentious cases are concerned.[1] The legislator's reason for the general norm is to safeguard witnesses' liberty to testify.[2] This also explains why the norm does not provide for any exception whatever in marriage cases, as we shall see. Witnesses may be present during oral process (c. 1663).

But this general norm also has exceptions. The legislator chose not to specify the exceptions, covering them instead with the phrase: "unless, especially when there is a question of a private interest, the judge has determined that they are to be admitted." The legislator gave the judge guidance in granting him this faculty, "especially when there is question of a private interest."

1. Cf. F. ROBERTI, *De processibus*, II (Rome 1941), p. 59.
2. Cf. F. ROBERTI, *De processibus*, II, cit., p. 60; A. REIFFENSTUEL, *Ius canonicum universum*, II, tit. XX, no. 499.

We must recognize the possibility that the parties' presence is advisable in certain situations, and this will be decreed by the judge after taking into account all the particular circumstances surrounding such situations. Let us therefore consider the norm, with its exceptions in concrete cases considered by a judge, to be wise.

It should be pointed out that the parties have no right to be present during this testimony and cannot demand the right from the judge. The parties may ask the judge to consider the possibility and advisability of their presence. Also, the judge, at his own initiative, may decree their presence. To do so, the judge must follow the requirement of noting that there are no obvious dangers and that there are advantages in shedding more light to clarify the truth of the facts: to safeguard the liberty of the witnesses, which is the legislator's reason for promulgating the general norm.[3]

It is another issue whether a judge may allow one party to hear only one's own witnesses' testimony or only the testimony of the opposing party's witnesses or both. The canon does not go into such detail nor does it make such distinctions. In any case, the principle of equality should be followed, and since the canon does not make distinctions, neither should the judge make any distinctions. Ordinarily, neither the promoter of justice nor the defender of the bond is party to the case. They are thus not mentioned in this norm. When they are, they would have to follow the general norm.[4]

A request was made during the drafting of this canon that no exceptions to the general norm be allowed and that parties never be allowed to hear witnesses' testimony. But the arguments adduced by the proponents of this request were more germane to marriage cases. The flexible norm for general cases was therefore retained, and a norm with no exceptions was adopted for marriage cases,[5] as can be seen in c. 1678 § 2.

In marriage cases, where the main evidence is ordinarily testimony and the public good is affected, the need to safeguard witnesses' liberty really is more urgent. This is the main reason for an absolute norm, with no exceptions, in these cases.

If parties cannot be present at the examination of witnesses, we believe that they cannot be present, as a general principle, at the examination of experts, either. The reason would be the same. The canon says nothing about the examination of experts. On the other hand, parties in marriage cases are expressly prohibited from being present during the

3. Cf. ibid.
4. Cf. M. LEGA-V. BARTOCETTI, *Comentarius in iudicia ecclesiastica*, II (Rome 1950), p. 705, no. 3.
5. Cf. *Comm.* 11 (1979), p. 114.

testimony of experts (c. 1679). Indeed, experts are witnesses, although they are qualified[6] by the knowledge to which they testify.

2. The general norm is affirmative as to whether advocates and procurators may be present at the examination of witnesses. This is new in the canonical discipline of the *CIC*. It continues to be an innovation of remarkable interest. It is a faculty granted to advocates and procurators by the legislator, although it is limited by a judge's determination: "unless by reason of the circumstances of matter and persons, the judge had determined that the proceedings are to be in secret."

The canon does not distinguish whether they can be present at testimony by their witnesses only or the opposing party's witnesses only or both; nor should we distinguish. The faculty is applicable to all witnesses.

There is no doubt that the judge has broad powers to disallow this presence. The phrase "the circumstances of matter and persons" gives the judge great latitude in granting exceptions in numerous specific cases. Experience teaches how well justified these exceptions are.

For the reasons given above, we shall say that they may also be present at testimony given by experts (cf. c. 1678 § 1, 1°).

Of the reasons underlying this general norm, two are expressly mentioned in the documents written by the code commission: "to establish similarity to the practice of lay tribunals and resolve difficulties in the instruction itself."[7] On the other hand, the danger of limiting the witnesses' liberty is not so evident. The other disadvantages must be avoided by the judge by ensuring that the norms against abuses by the advocates themselves are rigorously observed.

Taking all these reasons into account, the legislator has provided that in marriage cases, "the advocates ... have the right ... to be present at the examination of ... the witnesses and the experts" (c. 1678), without prejudice to c. 1559.

In concluding the commentary on this canon, we shall say that the presence of the advocates during the witnesses' testimony demands that the defender of the bond and the promoter of justice be present, at least so that the bond would not be of a lesser status than a party. This same conclusion on how the presence of the defender of the bond is allowed[8] is reached in analyzing the *iter* followed in drafting c. 1559. It is so legislated in marriage cases (c. 1678).

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6. Cf. L. DEL AMO, "Valoración del peritaje psiquiátrico sobre neurosis, psicopatías y transtornos de la sexualidad," in *Ius Canonicum* 23 (1982), p. 652.
7. *Comm.* 2 (1970), p. 186.
8. *Comm.* 11 (1979), p. 263.

1560 **§ 1. Testes seorsim singuli examinandl sunt.**

§ 2. Si testes inter se aut cum parte in re gravi dissentiant, iudex discrepantes inter se conferre seu comparare potest, remotis, quantum fieri poterit, dissidiis et scandalo.

§ 1. The witnesses are to be examined individually and separately.

§ 2. If in a grave matter the witnesses disagree either among themselves or with one of the parties, the judge may arrange for those who differ to meet or to confront one another, but must, in so far as possible, eliminate discord and scandal.

SOURCES: § 1: c. 1772 § 1
§ 2: c. 1772 §§ 2 et 3; *PrM* 133

CROSS REFERENCES: cc. 1435, 1455, 1470, 1600, 1663

COMMENTARY

Feliciano Gil de las Heras

No witness may be present during the examination of another witness. The norm of the canon is categorical to the point that when it was being drafted, a suggestion intended to mitigate its inflexibility with the phrase "unless the judge deems otherwise" was rejected. The reason given is the same reason that underlies the general norm itself—so that some witnesses do not influence others: "If each witness is not examined individually and separately, it is most likely that some witnesses will give testimony influenced by others."[1] This is precisely what is trying to be avoided. However, that testimony would not be null and void if other witnesses were present, although it would be less valuable.

The great danger that the presence of witnesses during testimony by other witnesses would pose for the search for the truth is clear to everyone. This prohibitive norm has been a constant in canon law. And if the legislator has made this decision to avoid this danger, judges should also take the necessary action available to them to ensure that witnesses do not tell other witnesses how they have testified. Waiting rooms must be designed so that contact among witnesses is not easy. This precaution to be taken by judges is more necessary now that the *CIC* says nothing about an oath by witnesses to keep their testimony confidential (cf. c. 1769 *CIC*/1917). Of course, anyone who is not involved in the case in any way may assist in the examination of witnesses. Canonical trials are confidential proceedings (cc. 1455 and 1470).

1. *Comm.* 11 (1979), p. 114.

In spite of the categorical norm not allowing any exception whatsoever to the general principle, the legislator allows witnesses to face each other or the parties when their testimony is contradictory. This is what we call a "face-to-face meeting" in our language. This step, which, properly speaking, is not an exception to the norm, is subject to a series of recommendations and precautions, given the delicate nature of holding such meetings.

First, a face-to-face meeting assumes that the witnesses have already testified individually and separately. And only if "the witnesses disagree either among themselves or with one of the parties" may this step be taken. A disagreement about superficial matters or matters of little importance that do not affect the merit of the case would not be sufficient. The disagreement must be about a "grave matter." And even then, the legislator further specifies the circumstances that must exist in order to resort to a face-to-face meeting: the judge "must, in so far as possible, eliminate discord and scandal."

It is not a matter of any right the parties have that this step should be taken. It is the judge who "may arrange the face-to face meeting" and the judge may make a decision to do so either at his own initiative or at the request of either party. Neither does the legislator impose this step on judges as an obligation; rather, its advisability and the determination of whether the circumstances mentioned in the norm exist are left to the judge's discretion. All this indicates the reservations with which the legislator himself allows face-to-face meetings in procedural rules.

The fact that the phrase about avoiding discord and scandal is an ablative absolute could lead one to assume that it is a condition affecting validity. But in the new discipline, according to c. 39, there are no longer grounds for this assumption. Similarly, there would be no nullity by virtue of the phrase "in so far as possible," which is hardly consistent with a condition under the invalidity of acts. But allowing a face-to-face meeting in the absence of the conditions required by the legislator would be illicit. The requirements indicated in the norm must all occur simultaneously in order for a meeting to be licit. Determining whether a grave matter exists is left to the prudent judgment of the judge.

A face-to-face meeting is not a proof. So neither party may request that it be considered proof, nor may a judge consider that petition as a proof. It is rather a matter of taking certain care or precautions required by law to avoid dangers in which certain evidence may be discovered.[2] Thus this issue should not even be resolved as a disputed collateral issue by hearing the other party. Nor may the other party challenge a judge's de-

2. Cf. L. DEL AMO, *Valoración de los testimonios en el proceso canónico* (Salamanca 1969), p. 11; idem, *Sentencias, casos y cuestiones en la Rota Española* (Pamplona 1977), p. 548.

cision even if one considers a judge's decision not to allow a face-to-face meeting to be imprudent: *Iuris executio non habet iniuriam.*[3] Rather, a face-to-face meeting may be considered an unusual way of examining parties and witnesses. And the weight of statements made in the meetings shall be similar to secondary testimony, retractions or contradictions.

Both civil and canon lawyers hold a shared opinion with respect to the practical inefficacy of face-to-face meetings. This citation serves as an example: "Long experience has taught me that in cases of nullity of the marriage bond and separation cases, face-to-face meetings between the parties or with witnesses only result in outcomes that are bitter and useless."[4] We believe that certain advantages of a face-to-face meeting can be obtained, without the concurrent disadvantages, by recalling the parties or witnesses and asking them individually and separately about these discrepancies. A judge has the powers to do so (c. 1570). *Provida Mater* 114 § 2 also provided for this.

In conclusion, we shall say that the face-to-face meeting method is quite rarely used in canonical proceedings, especially in marriage cases.

3. ULPIANO, 2. 13 § 1, *de iniur.* 47,10.

4. A. JULLIEN, "Juges et avocats dans la procédure canonique," in *Ephemerides iuris canonici* 21 (1965), p. 30, footnote 14.

1561 **Examen testis fit a iudice, vel ab eius delegato aut auditore, cui assistat oportet notarius; quapropter partes, vel promotor iustitiae, vel defensor vinculi, vel advocati qui examini intersint, si alias interrogationes testi faciendas habeant, has non testi, sed iudici vel eius locum tenenti proponant, ut eas ipse deferat, nisi aliter lex particularis caveat.**

The examination of a witness is conducted by the judge, or by his delegate or an auditor, who is to be attended by a notary. Accordingly, unless particular law provides otherwise, if the parties or the promotor of justice or the defender of the bond or the advocates who are present at the hearing have additional questions to put to the witness, they are to propose these not to the witness, but to the judge, or to the one who is taking the judge's place, so that he or she may put them.

SOURCES: c. 1773; SCDS Regulae, 7 maii 1923, 24 § 1; *PrM* 101

CROSS REFERENCES: cc. 1428, 1437

COMMENTARY

Feliciano Gil de las Heras

This canon provides a general principle in answer to the question as to who is to examine witnesses: "The examination of a witness is conducted by the judge, his delegate or an auditor ..." An exception is provided to this general rule in the same canon: "unless particular law provides otherwise."

The reason for this norm is the importance the legislator wishes to attach to proper instruction of the case. Juridical knowledge and procedural experience are necessary to do so. Not everyone is prepared for this. Even in the case of a delegate, the delegate must be qualified. A judge that has rendered decisions is better prepared for this duty than one who has not.

If we ask what system is best, i.e., whether the investigation should be conducted by the ponens, the auditor or a delegate, we would say that there are advantages and disadvantages in each system. There may be specific cases where one system might be preferable over the others. Immediacy, whereby whoever instructs the case decides it, has evident advantages.

It should be noted from the beginning that the exception provided in the canon mentions the three elements comprising the norm: active presence of the judge and notary and how the persons at the examination put questions. This is how the canon was drafted: it was pointed out by one of the consulting bodies that the phrase "unless particular law provides otherwise" could also apply to the notary by virtue of his/her presence at the examination, in which case particular law could provide that the presence of a notary was not necessary during the examination of witnesses, either. This comment was accepted by the consultors, who opted to insert the phrase at the end of the canon rather than at the beginning, which is where it had been in the earlier text. By placing it at the end, it was possible to "satisfy also the suggestion of those who believed that the parties' questions could be asked of a witness directly, according to the custom of a given place."[1]

It is clear that in the absence of such particular law, the absence of a judge, his delegate or an auditor to examine a witness is somewhat contrary to the norm. But would such an examination be invalid?

Under the earlier discipline, we have no doubt that such examinations were null and void: they would be extra-judicial documents and as such, they would have to be weighed by the judge. An exception could be proposed.[2] Rotal decisions had to be amended when, in the absence of a judge during examination, testimony was given before a notary,[3] or testimony could not be amended because it was given before the notary and the defender of the bond,[4] or testimony without a judge's signature was corrected on condition that the presence of the judge was noted.[5]

Nowadays we would not venture to say this precisely because of the insertion into the canon of the phrase "unless particular law provides otherwise." This removes the inflexibility of the norm itself, which is otherwise mandatory under penalty of nullity of the acts. Certainly, taking testimony by a notary, a defender of the bond or any other person not so delegated would be an illicit act. The judge would have to take this into account when weighing the evidence.

A delegated judge may be a cleric or a layperson (c. 1428). Neither the notary nor the defender of the bond may be delegated to perform the judge's duties in the same case in which they are serving as notary or defender of the bond. They cannot play two roles in the same case. But would the examination be null and void? We believe that if the notary is

1. *Comm.* 10 (1978), p. 115.
2. Cf. I. TORRE, *Processus matrimonialis*, (Neapoli 1956), pp. 244–245; L. DEL AMO, "La forma procesal y el actuario," in *Revista Española de Derecho Canónico* 24 (1968), p. 26; c. JULLIEN, January 12, 1935, in *SRR Dec* 27 (1935), p. 19, no. 3.
3. Cf. c. QUATTROCOLO, April 11, 1933, in *SRR Dec* 25 (1933), p. 228, no. 2.
4. Cf. c. JULLIEN, January 12, 1935, in *SRR Dec* 27 (1935), p. 19.
5. Cf. c. MASSIMI, July 18, 1934, in *SRR Dec* 26 (1934), p. 537.

also the judge, the examination could be challenged, since the notary would be certifying what he himself did as judge. Neither the independence nor the impartiality that should accompany a judicial function would be safeguarded, nor would the guarantee that the notarial function is to provide be safeguarded. We would say the same thing if the defender of the bond served as judge.

The statement in the canon about the requirement that a notary be present when witnesses testify is quite clear: "who is to be attended by a notary." But is this attendance necessary under pain of nullity of the acts? We would give the same answer that we gave with respect to the judge's presence. Under *CIC*/1917 legislation, the acts were null and void in the opinion of some jurists.[6] Under current legislation, the general principle that a notary must be present at the examination of witnesses has an exception that is stated in the canon itself: "unless particular law provides otherwise." This phrase also applies to the notary's presence during the examination of witnesses, which was expressly requested by one of the consultor bodies.[7] Given the norm's flexibility, we would not venture to say that a judicial examination is null and void if a notary was not present. Would that examination be saved by his/her signature (c. 1437)? Of course, the absence of a notary would make a witness's testimony illicit and would be a violation of the law wherever particular law did not provide otherwise. But if no notary was present at an examination, how could he certify the written record? This is how an examination in the absence of a notary could be somehow challenged, even if a notary's signature is obtained.

It should also be taken into account that the matter of nullity on the grounds that a notary was not present during a witness's testimony was not clear even in the earlier legislation, provided another member of the tribunal, such as the defender of the bond, was present and signed. A *c. Pinna* decision said that the absence of the notary did not respect the spirit of the norm contained in c. 1773 § 1 (*CIC*/1917). The examinations would have been null with an irremediable nullity if the defender of the bond had not been present.[8] Validity would then rest on the trust the notary placed in another person testifying to him.

Given the presence of the defender of the bond, the promoter of justice and the advocates at an examination of witnesses, it is also necessary to regulate whether they may ask the witnesses questions. The norm is that they may ask questions, but through the judge rather than directly: "they are to propose these … to the judge, or to the one who is taking the judge's place, so that he or she may ask them." And this general norm is

6. Cf. I. TORRE, *Processus*…, cit., p. 59; L. DEL AMO, "La forma…," cit., p. 21; c. QUATTROCOLO, June 7, 1934, in *SRR Dec* 26 (1934), p. 350, no. 6.
7. Cf. *Comm.* 10 (1978), p. 115.
8. Cf. c. PINNA, November 28, 1957, in *SRR Dec* 49 (1957), p. 761, no. 2.

also subject to the exception or limitation of the phrase "unless particular law provides otherwise."

This phrase was added to preserve the custom in some places where witnesses may be questioned directly and not necessarily through a judge. However, it also allows particular law to so provide where it was not previously the custom. But it would be advisable to observe uniformity, at least in each given nation.

It would also seem logical that a delegated judge or auditor should be able to ask questions or follow-up questions from the list provided by the advocate, the defender of the bond, or the promoter of justice. These are "ex officio" questions that have already been submitted in procedural practice.

The judge may admit or deny questions submitted by anyone present at an examination, and he/she has the faculty to do so. If questions are denied and the parties insist that they be asked, an incidental matter may arise that should be resolved like any other incident.

1562 **§ 1. Iudex testi in mentem revocet gravem obligationem dicendi totam et solam veritatem.**

§ 2. Iudex testi deferat iuramentum iuxta can. 1532; quod si testis renuat illud emittere, iniuratus audiatur.

§ 1. The judge is to remind the witness of the grave obligation to tell the truth and nothing but the truth.

§ 2. The judge is to administer an oath to the witness in accordance with can. 1532. If, however, a witness refuses to take an oath, he or she is to be heard unsworn.

SOURCES: § 1: c. 1767 § 4; *PrM* 96 § 2
§ 2: c. 1767 § 1; *PrM* 96 § 1

CROSS REFERENCES: cc. 1532, 1548, 1568

COMMENTARY

Feliciano Gil de las Heras

1. Under § 1, the judge has the duty of reminding a witness of his or her obligation to tell the whole truth and nothing but the truth. This is a grave obligation for a witness and it is of great importance that the judge fulfills this duty. The judge should also explain the reasons for this grave obligation. This concerns explaining the consequences arising from a decision for or against a given party. A witness's testimony may make the difference in the final decision. A witness honors this obligation by answering, to the best of his or her knowledge, the questions asked by the judge.

The importance of this norm and the reason for it are evident. Many times witnesses would testify to something that was not true and after a time of reflection, they would approach the tribunal asking to recant something that might not be possible, because the situation had become much more complicated. A warning made by a judge fulfilling this duty may be sufficient to persuade a witness intent on giving false testimony to change his or her mind and tell the truth. Thus, the reason for this canon is the need to make every effort to be certain that witnesses are effective.

The judge must explain what is expected of a witness with respect to the truth: i.e., what he or she saw or heard, not opinions, conclusions or presumptions. The truth that is asked of a witness has to do with what the

witness heard or witnessed. It is in this sense that a witness is asked for "his or her version of the truth." It is the judge's mission to determine whether this version of the truth is the historical, objective truth.

The canon, in imposing on the judge this duty of reminding witnesses, also is referring to c. 1548, which prescribes witnesses' obligation to obey the judge and answer truthfully all relevant questions legitimately asked by the judge, unless a witness is exempt from the obligation to answer. On occasion, it may be relevant for a witness to state his or her opinion on a specific matter, especially the reasons supporting opinions.

2. In connection with the witnesses' obligation to tell the truth, the judge's duty is to remind him/her, as prescribed in § 2 of this canon. It imposes on the judge the obligation to ask witnesses to take an oath to tell the whole truth and nothing but the truth, referring to c. 1532 on administering an oath to the parties.

This oath has been required of witnesses since the time of the decretals.[1] The custom was to require a promissory oath or an oath to tell the truth. The assertory oath or the oath to have told the truth was also introduced in those times. There was a period of time when both oaths were required. In the *CIC*/1917, administering the promissory oath was obligatory, and the assertory oath was left to the judge's discretion. In practice, both were administered.[2]

The *CIC* leaves both to the judge's discretion. But the judge is obligated to administer one or the other, especially in cases involving the public good. This principle is also limited in concrete cases in which a judge, even in the case of a grave cause, may consider it more advisable to proceed without an oath. But this is due to the existence of a grave cause, which is to be determined by the judge himself, not to his discretion.

In cases not involving the public good, a judge, at his prudent discretion, may proceed, and no grave cause is required for omitting the administration of an oath. The *CIC* says nothing about the judge's faculty to omit the administration of an oath if the parties agree to omit it. In reality, an oath is administered to guarantee witnesses' credibility. Such an agreement by the parties, in cases involving private good, would be one of the factors to be weighed by the judge in determining whether an oath should or should not be administered.

There is no doubt that a judge also has the faculty to require an oath during testimony in matters of special gravity or in the event of a contradiction in the testimony itself.

We should note that the promissory oath is preferred over the assertory. A witness is aware from the beginning of his or her testimony that he

1. Cf. X II, *20*, *39* and 47.
2. Cf. F. ROBERTI, *De processibus*, II (Rome 1941), pp. 54-56, no. 342.

or she is sworn under oath to tell the whole truth and nothing but the truth. If the judge opts to require an assertory oath, he should warn witnesses prior to taking testimony that an oath of having told the whole truth and nothing but the truth will be administered when the testimony has been completed. Otherwise, a witness could be put in a situation where it would be easy for him or her to perjure himself or herself and would be embarrassed to have to correct his or her testimony upon learning of an obligation of which he or she was not aware.

3. The *CIC* says nothing about an obligation to keep testimony confidential. This oath was no longer mandatory in the preceding discipline. There are other ways that should be put into practice to prevent witnesses from disclosing their testimony. Guaranteeing secrecy by requiring an oath is to put witnesses in a position where they could very easily break it.

4. If a witness refuses to take an oath, c. 1562 § 2 does not mention penalties of any kind. It only imposes on judges an obligation to hear the unsworn witness. This was already the practice in ecclesiastical tribunals.

Whether a judge should consider this refusal when weighing this testimony of the witness is another matter. Formerly, the principles of "testis non iuratus non probat" and "testi non iurato non creditur"[3] were followed. The *CIC* does not expressly give judges any criteria whatsoever for weighing testimony in such cases, but the fact that c. 1568 requires the notary to indicate in the acts whether a witness took an oath or not indicates that the legislator wishes any refusal to be considered when weighing that witness's credibility.

It may not have been a good decision in those times to follow the principle of "testis non iuratus non probat" to the letter. Nor is the oath, in any case, a full guarantee of credibility nowadays, either. It is the judge who must consider all the circumstances and weigh the credibility of unsworn witnesses. If everything comes together for their credibility, full credence may be given. In principle, we may say that an unsworn witness merits less credibility than a sworn witness. In specific cases, there may be exceptions to this principle. If all of the witnesses introduced refused to take an oath, this fact may have more importance.

Knowing the reasons why a witness refused to take the oath may also be important. A witness may be so anxious and fearful of committing perjury that he or she refuses to take an oath because of this personality trait rather than any intent not to tell the truth. Another reason may be a desire not to commit perjury if a witness intends not to tell the truth. In any case, we must conclude that whether or not an oath was taken when testifying has importance for weighing testimony. Otherwise, the prescription to reflect this in the record would be pointless.

3. X II, 20, 51.

The *CIC* says nothing about the parties' presence when the oath is administered to witnesses. *CIC*/1917 permitted this. Under current legislation, the parties are prohibited from being present during testimony, but not from being present when the oath is administered.

Nor does the *CIC* say anything about the meaning that a witness's failure to give testimony may have. In reality, no general principle can be given because it depends on each given case and the circumstances surrounding it. *CIC*/1917 left its consideration up to the judge (c. 1743 § 2). Jurisprudence teaches that the circumstances attending specific cases should be considered and that a decision will ensue from them.[4]

4. Cf. c. PARRILLO, July 4, 1922, in *SRR Dec* 14 (1922), p. 301, no. 6; *PrM* 112.

1563 **Iudex imprimis testis identitatem comprobet; exquirat quaenam sit ipsi cum partibus necessitudo et, cum ipsi interrogationes specificas circa causam defert, sciscitetur quoque fontes eius scientiae et quo definito tempore ea, quae asserit, cognoverit.**

The judge is first of all to establish the identity of the witness. The relationship which the witness has with the parties is to be probed, and when specific questions concerning the case are asked of the witness, enquiry is to be made into the sources of his or her knowledge and the precise time the witness came to know the matters which are asserted.

SOURCES: c. 1774; *PrM* 97, 99, 100

CROSS REFERENCES: cc. 1471, 1530, 1531, 1533, 1534, 1548, 1558, 1561, 1564, 1565, 1568

COMMENTARY

Feliciano Gil de las Heras

The interrogatory consists of general questions having to do with identifying the witness and other specific questions about the case. The canon imposes on the judge the obligation to establish a witness's identity. All the following information is necessary for a better interpretation and consideration of testimony: full name, age, religion, profession, place of residence and place of birth. Sometimes, this information may resolve a question or shed light on matters related to the merit of the case. A judge who is negligent in meeting this requirement would be making a poor beginning in instructing a case. A poor investigation would have grave consequences for the final decision. All questions related to a person's identity are usually called *general questions of law.*

Identity would be established with a legitimate document, such as the National Identification Card in Spain. This identification may not be required if the witness is personally known to the instructor, defender of the bond or notary. In such cases, this shall be duly noted in the acts. Identification of the party by a lawyer who shows that he/she personally knows the witness should not be overlooked. A letter of the parish priest stating that the bearer is the person whose name appears on the letter is not acceptable. The reason is that these letters do not have a photograph of the person.[1]

1. Cf. I. Torre, *Processus matrimonialis* (Naples 1956), p. 241; *PrM* 97.

General questions must include determining the relationship between the witness and the litigants. It is incumbent upon the judge to weigh the witness's credibility and knowledge about what he or she will testify to.

With respect to specific questions, the interrogatory must also include questions about the source of the knowledge of facts which the witness says he or she knows. There may be various sources: *first-hand knowledge* if the facts have been learned directly; *credulity* if the facts have been deduced by inference rather than learned directly; hearsay if the facts are heard from a third party; or *common knowledge* if the facts derive from a broad opinion among people.

The norm requires witnesses to specify their sources of information further: to state "the precise time the witness came to know the matters which are asserted." This is of great relevance in weighing testimony. A witness is not asked to give the day, time, etc., but rather to say when he or she learned the facts with respect to three points of reference: whether it was before or after a couple contracted marriage; whether it was before or after problems arose between the spouses; and whether it was when the petition for the nullity of the marriage was being prepared or before it had been considered. It is fundamentally important to determine whether a witness learned everything he or she testifies about only at a *suspect* time, to use procedural terminology. The suspect time is when the petition is being considered or prepared. In marriage cases, this information is of the greatest importance. In general, we can say that the time when "the thought of filing the petition had not even occurred and there were no other reasons to lie or hide the truth"[2] is notsuspect. On the other hand, once "the interested party learns that the marriage could be declared null and begins to talk about the grounds of nullity to prepare witnesses,"[3] this is considered a suspect time. But the time when problems arise between a couple and they increasingly come to dislike each other may also be considered a suspect time, because they may be considering going to an ecclesiastical tribunal.[4] There are many Rotal decisions to this effect.

As a general principle, the credibility of witnesses during a suspect time is quite reduced. If all the witnesses are of this type, the prudent thing would be not to consider evidence full. Although the more rigorous requirements of other times that such witnesses "nihil probant," as the *Austrian Instruction*[5] states are no longer applicable, neither can they be considered witnesses from a non-suspect time. No insult of a witness with excellent credibility is intended, nor is his/her honesty impugned. The only thing in doubt is what he/she was told at a suspect time.

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2. *Coram* MANUCCI, July 27, 1931, in *SRR Dec* 23 (1931), p. 327, no. 4.
3. *Coram* WYNEN, May 6, 1941, in *SRR Dec* 33 (1941), p. 380.
4. Cf. c. FELICI, March 30, 1949, in *SRR Dec* 41 (1949), pp. 140-141, nos. 2-5.
5. Cf. nos. 148 and 149; c. GRAZIOLI, January 20, 1926, in *SRR Dec* 18 (1926), p. 9, no. 15.

When a witness testifies about both the source of his or her knowledge and when he or she learned what he or she is testifying to, he or she must describe as precisely as possible the circumstances of place, who else was present, the motives, etc. It is true that it may sometimes not be easy to remember them, given the length of time that may have elapsed, but at other times it is not so difficult. Questions about these circumstances are fundamental when the time that has elapsed is short. If the witnesses are telling the truth, their testimony on these circumstances will agree. If they are giving false testimony, it is likely that they will relate different or even contradictory stories or it may become clear that they are not telling the truth if they cannot give the specific circumstances.

When the authors and jurisprudence require that witnesses give testimony in a narrative, they are asking for the greatest amount of detail, which can be compared for similarity later. The skillful words of Cardinal Jullien serve as an example: "The judge shall intelligently, energetically and prudently attempt to discover the truth by reconstructing the facts and attendant circumstances, with all the subtleties of human behavior... In order to do so, the judge should insist that a witness give testimony in the form of a narrative to give detailed circumstances that can then be compared to weigh the testimony. If the testimony does not include these circumstances, there is little to study, organize, review critically or *compare.*"[6] A Rotal decision expresses it in these words: "It is necessary to add detail of who said what, when, and in what context something was heard, seriously or jokingly. Otherwise, testimony is deficient by virtue of the absence of elements enabling it to be verified."[7] Such witnesses are "generic" witnesses that prove little or nothing at all, as can be seen in the following canons.[8]

6. A. JULLIEN, *Juges et avocats des Tribunaux de l'Église* (Rome 1970), pp. 343, 355, 360ff; cf. c. LANVERSIN, June 30, 1991, in *Monitor Ecclesiasticus* 117 (1992), p. 55, no. 14.

7. *Coram* GIANNECCHINI, November 19, 1982, in *SRR Dec* 72 (1982), p. 840.

8. Cf. L. DEL AMO, "Valoración del peritaje psiquiátrico sobre neurosis, psicopatías y transtornos de la sexualidad," in *Ius Canonicum* 23 (1982), p. 124.

1564 **Interrogationes breves sunto, interrogandi captui accommodatae, non plura simul complectentes, non captiosae, non subdolae, non suggerentes responsionem, remotae a cuiusvis offensione et pertinentes ad causam quae agitur.**

The questions are to be brief, and appropriate to the understanding of the person being examined. They are not to encompass a number of matters at the same time, nor be captious or deceptive. They are not to be leading questions, nor give any form of offence. They are to be relevant to the case in question.

SOURCES: c. 1775; *PrM* 102

CROSS REFERENCES: cc. 1471, 1531, 1533, 1548, 1552, 1561, 1568

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An examination has three parts: *a*) *orientation* or preparation, where information is taken concerning the witness's identity, his or her relationship with the litigants, the knowledge the witness has of the litigants and his or her attitude toward testifying; *b*) the second part, known as the *exposition*, contains the questions intended to clarify the facts in dispute: this is the core of the examination; *c*) the third part, *confirmation*, is intended to determine circumstances or significant details related to the principal facts that might help to determine the historical truth better. This third part also includes questions about the circumstances of persons, time, place, etc., that might confirm the witness's veracity.

Examinations of witnesses are different from *positions*. The latter use phrases like: "Is it said to be true that ..." or "How is it said that ..." Whatever the customs may have been in other times, this system is considered flawed today, with grave disadvantages, being poorly suited for determining the facts. It should disappear altogether from ecclesiastical tribunals as soon as possible, if it has not already done so. Testimony based on answers to such *positiones* has little or no weight as evidence, because these are leading questions. In fact, even when the witness is truthful, such testimony is not useful because the witness has only agreed with what is suggested in the question. The *CIC* has eliminated the very term *positiones* which is equivalent to *statements* in the common terminology.[1]

1. Cf. c. 1745 *CIC*/1917 and c. 1533 *CIC*.

There is no doubt that testimonial evidence has become less credible today. This is due, in large part, to the fact that little attention was sometimes given to the prescriptions on how examinations should be conducted and what witnesses' answers should be. This is all contained in this article on the examination of witnesses.

Canon 1564 describes the requirements for questions to be answered by witnesses. Examinations are intended to be a way of determining the truth. It should therefore meet the requirements necessary to attain this goal. A defective examination, far from determining the truth, may lead us to untruth.

a) "The questions are to be brief," says the canon. A lengthy question has several points and may confuse the judge investigating the case. A witness may become lost among the various points involved and not address all of them. It may not be clear to the judge whether the witness has or has not answered certain points or which point the witness was addressing. Short questions avoid these dangers and defects. A long question is a source of error in all senses. Each question should only concern a single point. "They are not to encompass a number of matters at the same time," says the canon.

b) Questions must be "appropriate to the understanding of the person being examined." A technical question asked of someone who does not understand it, far from determining the truth, leads to error, because a question that is not understood cannot be answered truthfully. A judge may therefore not rephrase in technical terms an answer in layperson's terms. A technical phrase from a witness that is not versed in the field raises the suspicion that the witness gave a coached answer.

c) Questions "are not to be crafty or deceptive." Questions whose only possible answers would prejudice the party are crafty. Questions that are ambiguous or confusing so as to lead a witness to give the answer the questioner wants are deceptive. The goal is not to deceive a witness with questions so that he or she gives the desired answer, but to enable a witness to tell a narrative of the facts as he or she has seen or heard them.

In any case, the judge must know how to ask questions. He must not ask questions in such a way that an affirmative or negative reply or any other answer is suggested. He must not abuse his powers by preventing a witness from saying what he or she knows or wants to say. While a judge must avoid crafty and deceptive questions, at the same time he must not be indifferent to any concocted or suspicious stories told by a witness. A judge must know how to recognize when a witness lies. "If the judge instructor is alert, it will not be easy for a liar to keep up the lie without making any inconsistent or contradictory statements or leaving something out."[2]

2. L. DEL AMO, *Interrogatorio y confesión en los juicios matrimoniales* (Pamplona 1973), p. 37.

d) Questions "are not to be leading questions." This is another requirement given in the norm for examinations. Leading questions are one of the defects that most hinder discovery of the truth when instructing a case. When a witness is asked a leading question, the witness answers on the basis of what he or she heard in the question, not on the basis of what he or she knows. Questions are leading not only when they expressly contain the desired answer, but also when they insinuate it. Such questions limit the witness's freedom. A question must not take a fact for granted; instead, it must be phrased so as to determine what a witness knows about a fact. Thus it is important that an examination be structured so as to elicit a witness to *narrate* a fact, circumstance or anything else in dispute that is relevant to the merit of the case. General questions usually get general answers.

Judges have an obligation to avoid such leading questions. Otherwise, a judge might be seen as biased, and this could be grounds for refusal to answer. A judge, by asking different questions in an examination, can guide a witness to narrate further specific circumstances without asking any leading questions. In this case, it is a matter of the judge's expertise, not the leading or deceptive questions.

If the promoter of justice or the defender of the bond have prepared the questioning, the judge, not the advocates, shall conduct the examination of witnesses for them. Thus the defective practice of the so-called *positiones* consisting of a narrative of the facts to which a witness must answer "yes," "sure," "no" or "uncertain," will come to an end. It cannot be said that such replies are null and void, but it can be said that they have no weight whatever. Examinations must encourage the witness to tell what he or she knows, not what a party, advocate, judge or defender of the bond wants.

e) Questions "are not to give any form of offense." Offensive questions may be asked at the examination prepared by the advocates. The greatest danger here is when an advocate wishes to be present at the examination and question a witness of the opposing party. The judge must be unwavering in refusing such questioning and warn the advocate not to do so in the future. It is therefore necessary that a judge familiarize himself/herself with the questions and even study them in detail before beginning the examination of a witness. Only by doing so will he/she be able to conduct the examination properly. The judge should also be familiar with the acts of the case before beginning the examination. This will help him/her to know what questions to ask. A judge who is familiar with the case knows what questions to ask better than a judge that is not familiar with the case.

f) Questions must be "relevant to the case." This is the last of the norm's requirements for examinations. Questions that do not further the case or whose answers the witness would have no way of knowing are irrelevant. Witnesses have no obligation to answer such questions. Nor may

a judge lawfully ask such questions. It is incumbent upon the judge to determine whether a question is relevant or not, based on whether it is related to the merit of the case or contributes to evidence. However, the judge should not hesitate to gather all information that might be useful to determine the truth. Familiarity with the case should help the judge determine what is relevant and what is not. The art of examination is a technique that demands familiarity with the case and procedural experience. The judge must be free of all prejudice.

Ordinarily, the advocates prepare the questions on which their client's witnesses will be examined. They may also submit questions to be asked of the opposing party's witnesses. The promoter of justice and the defender of the bond may also submit questions (c. 1533). This is expressly prescribed for the Spanish Rota Tribunal.[3]

In marriage cases, the defender of the bond submits questions of his/her own in addition to those that may be asked by the judge during the examination. He also has the mission of "carefully examining the questions submitted by both parties and objecting to them as necessary, since the defender of the bond has the faculty to rephrase questions submitted by the advocates and shall not hesitate to do so in the case of leading questions" (*PrM* 70). If the defender of the bond deletes certain questions submitted by the advocates, the advocates may petition the judge to admit the questions as the advocates deem necessary.

3. Cf. *Reglamento del Tribunal de la Rota Española*, art. 12.

1565 **§ 1. Interrogationes non sunt cum testibus antea communicandae.**

§ 2. Attamen si ea quae testificanda sunt ita a memoria sint remota, ut nisi prius recolantur certo affirmari nequeant, poterit iudex nonnulla testem praemonere, si id sine periculo fieri posse censeat.

§ 1. The questions are not to be made known in advance to the witnesses.

§ 2. If, however, the matters about which evidence is to be given are so remote in memory that they cannot be affirmed with certainty unless they are recalled beforehand, the judge may, if he thinks this can safely be done, advise the witness in advance about certain aspects of the matter.

SOURCES: § 1: c. 1776 § 1; *PrM* 103 § 1 a
§ 2: c. 1776 § 2

CROSS REFERENCES: —

COMMENTARY

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Paragraph 1 prescribes that questions not be made known to witnesses in advance. This is a general principle and has an exception, which is in § 2 of the same canon.

The reason for this norm is the danger that lies in making the questions known to witnesses prior to the examination. This danger may arise for two reasons: the person that delivers the questions may talk to the witness, informing and advising him/her how to answer so as to favor one of the parties, or the witness, with the questions in front of him/her, may prepare oneself in a way that one knows to be favorable to the party that introduced him/her. The danger exists that witnesses may be forewarned, advised and even bribed. These dangers can be avoided in part if the witness learns of the questions at the time of examination. No one should inform or advise witnesses. Witnesses should testify from their own knowledge, not from what they have prepared or been coached. If witnesses are reminded of facts of special relevance, this does not constitute such defects.

Since this practice is not rare, doctrine and jurisprudence speak of "coached," "forewarned" or "suborned" witnesses. "Coached" witnesses are prepared, either with written notes or by having them write notes

themselves prior to testifying, or making certain suggestions or making certain statements in the presence of witnesses or a civil notary. "Forewarned" witnesses are influenced in other ways. They are advised on the testimony they are to give and at the same time they are spoken to or letters are sent to them suggesting how they should testify upon examination. This is more discreet, but no less prejudicial to truthful testimony.

Providing the questions to the opposing party so that he/she can prepare questions is an influence of civil law. This is not prohibited in the *CIC*, but neither is it mandated. There are hardly any cases of this in ecclesiastical tribunals. It should be noted that this is a system that overly complicates things, loses a lot of time, and produces more confusion than light.

Paragraph 2 of the canon gives the exception to the general norm. But this exception does not consist of being able to give the questions to a witness in special cases, but rather that when "the matters about which evidence is to be given are so remote in memory that they cannot be affirmed with certainty unless they are recalled beforehand, the judge may advise the witness in advance about certain points." For example, a doctor who is to testify to his/her observations about a patient should know in advance the points of interest to the judge. Otherwise, he/she would go into the examination remembering little or nothing about the person he/she had seen one day. However, even in these cases and similar cases, the judge must determine whether it is possible to do so "safely."

1566 Testes ore testimonium dicant, et scriptum ne legant, nisi de calculo et rationibus agatur; hoc enim in casu, adnotationes, quas secum attulerint, consulere poterunt.

The witnesses are to give evidence orally. They are not to read from a script, except where there is a question of calculations or accounts. In this case, they may consult notes which they have brought with them.

SOURCES: c. 1777; *PrM* 103 § 1b

CROSS REFERENCES: c. 1565

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This canon's prescription that testimony given by witnesses must be oral is a consequence of the matter regulated in the preceding canon. The reason is the same: to ensure that a witness testifies to what he or she has witnessed, not to what he or she has been told or coached to say. Written statements are grounds for suspicion that the witness has been informed, coached or influenced. The judge must not allow witnesses to use notes or other written records while giving testimony. This is the general norm.

Naturally, certain exceptions to this rule must be allowed. The canon gives one case: when "calculations or accounts are involved." But we believe this is meant to be an example.[1] Cases may arise, especially when there are numerous facts and considerable time has elapsed, when it may be necessary to make and use notes. The use of notes is frequently used by physicians since it is not always easy for them to remember dates that they may be asked about. This is not the case for expert witnesses, who have the information they need for their report, unless they must quote clinical records or other written materials.

Similarly, we would not hesitate to invoke this exception, making due notation in the acts, in the case of a person of integrity that cannot remember a large number of facts and other relevant information and takes an oath to tell the truth.

Testimony made on the basis of notes and other written records used by a witness in situations other than those falling under the exceptions mentioned in this canon that are not required by the nature of the issue in

1. Cf. M. LEGA-V. BARTOCETTI, *Comentarius in iudicia ecclesiastica*, II (Rome 1950), p. 715.

question could be challenged or objected to as illicit testimony. It is true that it is the judge who is to decide whether an exception is admissible, but the abuse of his/her power, with grave harm for the other party, cannot be allowed by the law.

The same conclusion would also be reached by studying the comments and replies made on this canon while it was being drafted. A request was made to delete this canon on the grounds that it dealt with detailed matters better left to the judge's discretion, but the request did not prevail. The reply was that this norm was in line with a tradition specifically grounded in c. 1777 *CIC*/1917 and that it "was useful to prevent proved and deplorable abuses in which witnesses are not examined by the judge, but are asked questions written by the advocate and sent to the judge. This canon should be retained to prevent such abuse."[2]

2. *Comm.* 15 (1984), p. 66.

1567 **§ 1. Responsio statim redigenda est scripto a notario et referre debet ipsa editi testimonii verba, saltem quod attinet ad ea quae iudicii materiam directe attingunt.**

§ 2. Admitti potest usus machinae magnetophonicae, dummodo dein responsiones scripto consignentur et subscribantur, si fieri potest, a deponentibus.

§ 1. The replies are to be written down at once by the notary. The record must show the very words of the evidence given, at least in what concerns those things which bear directly on the matter of the trial.

§ 2. The use of a tape-recorder is allowed, provided the replies are subsequently committed to writing and, if possible, signed by the deponents.

SOURCES: § 1: c. 1778; *PrM* 103 § 2, 129; SCDS Instr. *Dispensationis matrimonii*, 7 mar. 1972, IId (*AAS* 64 [1972] 248)

CROSS REFERENCES: cc. 1437, 1569, 1570, 1664

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1. Paragraph 1 of the canon is addressed directly to the notary, reminding him/her of his/her obligation to record a witness's responses in writing immediately. It is further specified that the notary must record "the very words of the evidence given, at least in what concerns those things which bear directly on the matter of the trial."

First, this obligation is incumbent upon the notary, not specifically on the judge. It is the notary who certifies what he/she enters in the acts. The credence to be given this act derives from the notary's certification of what he/she records (c. 1437), not from the fact that the judge dictates to the notary what he/she is to record. A notary must meet this requirement because it is the mission entrusted to him/her by the legislator, not because the judge directs it.

A notary must transcribe "the very words" used by the witness in his or her testimony. Since the notary has this obligation, the judge, in instructing him/her, should also meet this requirement. The judge has an indirect obligation. Transcribing verbatim, particularly "in what concerns those things which bear directly on the matter of the trial," is of the greatest importance, since these things essentially constitute the force of the

proof. Changing these words could harm one party and favor the other; it could harm the bond of marriage and favor the petitioner or vice versa. Simply speaking, an injustice could be committed. Consequently, since it is the judge that determines what is to be recorded by the notary (*PrM* 129), the judge must not use technical terms that a witness did not use, and a notary must not transcribe technical terms thinking they are what a witness meant. The mind of a witness must be interpreted by the tribunal by weighing all the evidence. The most objective way to interpret what a witness meant is to use the very words the witness employed in his or her testimony, not words the judge or notary think he or she meant. The judge may summarize the words of the witness, but the text must not be changed.

Witnesses may demand that the very words they use be recorded. If a judge refuses, witnesses may insist that this be done at that time or prior to publication of the acts (c. 1570) or after publication (c. 1600). It is within a witness's right to demand that the acts reflect his or her examination verbatim.[1]

The notary should make this transcription "immediately" after a witness speaks. He/she must not wait until a witness finishes testifying because of the danger that he/she might have difficulty remembering the very words that were used. This is why a notary must be present when witnesses give testimony.

The norm contained in the canon is absolute, so no exceptions are allowed when the testimony bears "directly on the matter of the trial." When it was requested during the drafting of this canon that it not be phrased as an absolute norm, the request was denied with the reply that "transcription of answers seems necessary to have a juridical record of the testimony itself to weigh the case and decide appeals and to handle any questions in general concerning the very substance of the testimony."[2]

There is no doubt that judges need to know the very words used by witnesses in order to weigh all the evidence as objectively as possible in order to be objectively just. If evidence is weighed in the form of words dictated by the judge or transcribed by a notary that more or less interprets what a witness meant, judges would be proceeding on the basis of an interpretation by the judge or notary, not what the witness said. That could change things so much ... and in a matter of the gravest relevance. A transcription of a witness's testimony, if it does not use the witness's words in matters directly related to the matter of the trial, could make the sentence null, since it would be based on untrue testimony if the meaning is changed when the words are changed. It is true that the record is read

1. Cf. I. TORRE, *Processus matrimonialis* (Naples 1956), pp. 247–249.
2. *Comm.* 15 (1984), p. 66.

to the witness afterward, but a witness may think that it is formally equivalent to what he said in simpler words.

Whatever a witness testifies that is directly relevant to the matter in dispute "concerns those things which bear directly on the matter of the trial." Indeed, if testimony constitutes evidence supporting the ground for which the marriage nullity has been petitioned or evidence resolving proof of the issue in dispute, we may say that it directly bears on the object of the cause. Thus, there is no small number of instances in which a witness is to testify to something directly related to this matter. Of course, there are other instances when testimony is even more relevant—for example, if a witness heard a spouse utter words excluding indissolubility. Testimony on the cause of simulation or contract is not so directly relevant. On this point, it is best that a greater number of answers be transcribed verbatim. Justice and objective truth will be better served.

2. The *CIC* goes one step further with respect to the use of tape recorders at judicial examinations. Instruction *Dispensationis matrimonii* of March 7, 1972, allowed tape recorders with the ordinary's consent.[3] In § 2 of c. 1567, it seems the judge determines whether or not a tape recorder is to be used. At any rate, the same norm sets two conditions: "provided the replies are subsequently committed to writing and, if possible, signed by the deponents."

It is the notary that must certify that his/her transcription is a faithful reflection of the witness's testimony. Like any act of judicial examination, the transcription must be signed by the notary and the judge (c. 1569 § 2). The witness's signature is not necessary. Witnesses need not wait until their testimony has been transcribed. The canon says they should sign if it is possible. But there is no doubt but that it is an inconvenience for a witness to have to return just to sign his or her testimony. However, witnesses should do so if it is not a great inconvenience.

There is no doubt that judicial procedures are accelerated by this norm. This is the reason for it. It is also true that transcription takes time. The tape must not be left untranscribed and sent that way to the appeal tribunal. That would not be complying with the norm. But neither should the judge be excused from being present during an examination, since he is to ask the customary questions during and after the examination. Nor may the notary be excused: he/she must certify both tape-recorded testimony and the transcription itself. It would be unfortunate if a norm intended to accelerate the judicial process corrupted the process itself or resulted in defects in the process.

Another condition imposed under c. 1569 (see commentary): "the record of the evidence … as played back from the tape recording, must be communicated to the witness, who is to be given the opportunity of adding, omitting, correcting or varying it."

3. Cf. *AAS* 64 (1972), p. 248.

This tape, as recorded, read, added to, omitted from, corrected or modified, is what is to be transcribed with all due faithfulness: this is how the tape retains its weight as authentic evidence. Deleting some statements or taking others out of context by playing parts of a tape would make it illicit or even falsified evidence, with no probatory weight.

1568 **Notarius in actis mentionem faciat de praestito, remisso aut recusato iureiurando, de partium aliorumque praesentia, de interrogationibus ex officio additis et generatim de omnibus memoria dignis quae forte acciderint, cum testes excutiebantur.**

The notary is to mention in the acts whether the oath was taken or excused or refused; who were present, parties and others; the questions added ex officio; and in general, everything worthy of record which may have occurred while the witnesses were being examined.

SOURCES: c. 1779

CROSS REFERENCES: cc. 1559, 1678

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In addition to the witnesses' testimony, the acts should address a number of other circumstances that are useful in weighing the testimony. Canon 1568 lists some of these and leaves the door open to recording all circumstances that merit mention in the record.

a) "Whether the oath was taken or dispensed or refused." The oath to tell the truth is not evidence, but it may be a guarantee of the sincerity and truthfulness to what a witness knows and testifies to. It is true that nowadays oaths are taken lightly and perjury is easily committed. However, if a witness is a religious person, an oath is taken to be a guarantee in favor of his or her credibility, assuming the witness will testify to what he or she believes to be true. An oath encourages a religiously well-formed witness not to falsify the truth, and this should be taken into account in weighing the witnesses' testimony.

The notary must note in the acts whether a witness took the oath and he/she should also note whether a witness refused. It is the notary upon whom this obligation is incumbent. Also, it is the judge who must weigh the fact, taking particular care to note the reason given for not taking the oath or the fact that no reason is given, and the notary should also make a note accordingly.

There are cases in which the oath is neither taken nor refused, but was dispensed instead. This should also be recorded, because it has importance when weighing the testimony. This may happen when a witness is scrupulous and taking an oath might upset his/her conscience.[1] Witnesses

1. Cf. L. DEL AMO, "La forma procesal y el actuario," in *Revista Española de Derecho Canónico* 24 (1968), p. 57.

are to take the oath by placing their hand on the Gospels. If the witness is a priest, he places his hand on his chest (*PrM* 96).

b) "Who were present, parties and others." This is also of interest, especially if the advocates were present. If so, they may not subsequently claim any irregularities that were not pointed out at the time. It is also of interest to know whether any irregularities occurred that should not have taken place, such as the presence of the parties at the examination of a witness. It is always of interest to the judge to know who is present when witnesses are examined. The legislator wanted this information to be noted in the acts because it might help in weighing the evidence.

c) "Questions added ex officio." In weighing evidence or testimony, the judge may find answers given by a witness to questions that are not in the interrogatory. It is necessary to know who asked these questions, what the questions were and whether they were asked spontaneously. The questions, the person who asked them, and the answers given must be recorded. The notary does not ask questions: this is not his/her mission. The judge may ask ex officio questions at any time during an examination.

d) "Everything which may have occurred while the witnesses were being examined." It would not be easy to list all the circumstances worthy of record that arose during the examination. They may be quite varied: whether an advocate left the room for personal or other reasons; whether he/she arrived after the testimony had begun; or whether the tribunal noted some detail or other that should be noted, such as whether a witness becomes nervous when asked a specific point. Care must be taken not to fail to record whether a witness submitted a document, whether it was admitted or denied or whether it was only shown, and the reasons.

It is true that the norm requires the notary to note all such circumstances in the acts. In so doing, notaries are performing their duties and obligations, not acting on the judge's orders. However, the judge may direct that a circumstance not noted by the notary be noted if the judge deems such a record necessary or advisable. Of course, the notary must note that the circumstances in question were recorded on the judge's instructions.

It should be noted that the norm authorizes a notary to record objective circumstances that occur during examinations of witnesses and that the judge also has the power to direct which circumstances are to be recorded. But the norm does not confer the power to record a subjective personal version of testimony. This is the case even though it was suggested while the canon was being drafted that "the judge should be directed to give his/her opinion on testimony in accordance with the elements given in c. 219 [which deals with weighing testimony] and note any circumstances that might be relevant." The relator, in agreement with the other consultors, said that "this suggestion could not be accepted

because the thinking of the other judges might be influenced by considerations that are perhaps subjective."[2]

Some judges have the custom of recording their general impression or subjective opinion of the witness, especially when testimony is requested by rogatory letters. This custom should be rejected. The norm directs the recording of objective facts, not subjective impressions or opinions. The record must note what happened, not opinions or impressions.

2. *Comm.* 11 (1979), p. 117.

1569 **§ 1. In fine examinis, testi legi debent quae notarius de eius depositione scripto redegit, vel ipsi audita facere quae ope magnetophonii de eius depositione incisa sunt, data eidem testi facultate addendi, supprimendi, corrigendi, variandi.**

§ 2. Denique actui subscribere debent testis, iudex et notarius.

§ 1. At the conclusion of the examination, the record of the evidence, either as written down by the notary or as played back from the tape-recording, must be communicated to the witness, who is to be given the opportunity of adding to, omitting from, correcting or varying it.

§ 2. Finally, the witness, the judge and the notary must sign the record.

SOURCES: § 1: c. 1780 § 1; *PrM* 104 § 1
§ 2: c. 1780 § 2; *PrM* 104 § 2

CROSS REFERENCES: cc. 1437, 1473, 1664

COMMENTARY

Feliciano Gil de las Heras

Canon 1569 imposes some requirements that must be met before a witness finishes testifying and leaves the room:

a) "The record of the evidence, either as written down by the notary or as played back from the tape recording, must be communicated to the witness." Meeting this requirement is so fundamental to testimony that it would lack weight if this requirement is not met.[1] In fact, a witness is entitled to see the record of his or her testimony. The ensuing consequences of testimony are grave. No one can be required to sign a document without knowing what the document states. This is the practice in everyday life and should be all the more so in matters of this gravity. This avoids subsequent instruction, incidents and even suspicion. Testimony must be read back, even if a witness says he or she trusts the notary, and even when time is pressing. It would be a grave matter to record that the testimony was read back if this is not true.

There are other reasons for this requirement. It is obvious that in reading his or her testimony, a witness may recollect additional relevant facts that he or she had not mentioned or a sharpened memory may

1. Cf. F. ROBERTI, *De processibus*, II (Rome 1941), p. 63.

require changing a shade of meaning or deleting something. The notary himself/herselfmay have made a transcription error. Given the importance of the instruction of the case, it must not be exposed to all these dangers. The examination cannot be completed until the witness has read his or her testimony as it has been transcribed or until it has been read to the witness.

Testimony may be read out loud by the notary or another person or by the witness.

Everything said about reading testimony also applies to playing back a tape recording. It is fundamental to testimony that it be heard by the witness.

b) After having been read his or her testimony or hearing the tape recording and before signing the record, the witness must be given the "opportunity of adding, deleting, correcting or modifying it." This flows from the preceding requirement. It would be pointless to have read the record or to have heard the tape if nothing could then be added, deleted, corrected or modified. It is to be expected that it might be necessary to change something upon being read or hearing one's testimony. We do so in everyday life. The same thing should not be denied in a matter of such importance. It is a basic right of the individual. Denying this right would invalidate the testimony itself.

The record itself should mention how the changes to the testimony desired by the witness were made after having read or having heard his or her testimony. Such changes must be made by the notary in the margin, at the bottom of the page or at the end of the record.

c) Signatures of the witness, judge and notary. This requirement is set forth in § 2 of this canon. The witness's signature is not required to validate the act. Thus if a witness does not know how to write or declines to sign, the signatures of the judge and notary are sufficient. However, a note should be made explaining why a witness did not sign (c. 1473). The *CIC* expressly says this and the same is true in doctrine and procedural practice. But the notary certifies that the record faithfully reflects the testimony given by the witness.

Others present at an examination may sign: the defender of the bond, the promoter of justice, and the advocates, but their signatures are not necessary. It should be noted whether any of the foregoing made any objections during the examination. If no objections were made, it is to be assumed that they are in agreement with everything that took place during the examination. Also, the notary has already noted that these persons were present. The notary always signs last to certify the foregoing signatures. If the notary's signature is missing, the record is null and void (c. 1437).

1570 **Testes, quamvis iam excussi, poterunt parte postulante aut ex officio, antequam acta seu testificationes publici iuris fiant, denuo ad examen vocari, si iudex id necessarium vel utile ducat, dummodo collusionis vel corruptelae quodvis absit periculum.**

Before the acts or the testimony are published, witnesses, even though already examined, may be called for re-examination, either at the request of a party or ex officio. This may be done if the judge considers it either necessary or useful, provided there is no danger whatever of collusion or of inducement.

SOURCES: c. 1781; *PrM* 107,135

CROSS REFERENCES: cc. 1452, 1455 § 3, 1589, 1600

COMMENTARY

Feliciano Gil de las Heras

The situation described in this canon involves two circumstances: 1) that witnesses have already testified; and 2) that their testimony or the record thereof has not been published. This is therefore different from the situation described in c. 1600, which occurs subsequent to the conclusion of the case.

a) The general principle is that a judge may call witnesses to testify again, even though they have already been examined. The canon itself sets forth three requirements: the judge must consider it necessary or advisable; there must be no danger of fraud or corruption; and the party must request it or the judge himself must ex officio consider it necessary or advisable.

The necessity or advisability of testifying again must be weighed in the light of what new testimony might contribute to a better understanding of the truth, clarification of questionable points, resolution of contradictions and casting light on the merit of the case. There are practical reasons for supporting a "face-to-face meeting" (cf. c. 1560), which has so many disadvantages. When new events have occurred or other events theretofore unknown become known, this necessity or advisability becomes clear, provided these events are relevant to the merit of the case. It is therefore necessary that the party requesting re-examination of a witness give reasons for the request. Only thus can the judge determine its necessity or advisability.

The canon does not expressly say that the defender of the bond or promoter of justice can also request re-examination of a witness, and there would be no reason whatever to prevent them from doing so.

b) The fraud or corruption that might arise is collusion, lying and bribery. *Collusion* is the witness deliberately (or consciously) betraying the party that introduced him or her by favoring the other party. *Collusion* is the telling of an untruth to favor one party over the other. *Bribery* is lying by a witness motivated by gifts or the promise thereof.

It should be remembered that even if the point has not yet come in a case when the acts are published, it is virtually the same as if they had been published if the advocate was present when the witnesses were examined. He/she is aware of defects in the evidence. It is different if the testimony is not known.

It is also true that when a witness testifies again, he or she may find errors that he or she would like to correct. The judge must remember that new testimony, before or after the acts are published, may contribute new information casting light on the merit of the case, but that it may also cover up fraud, confusion and lies.[1]

If one party requests re-examination and the other objects, the matter must be resolved like any other incident falling under c. 1589.

The canon does not address a case in which a witness himself/herself spontaneously requests to be allowed to testify again. The judge may also consider this request in the light of the criteria set forth by the legislator. The spontaneous appearance of a witness to re-testify would be the same thing.[2]

c) The reasons for and against allowing new testimony usually include correcting an error that has been pointed out; events that had been forgotten; clarification of certain questionable points; fraud or corruption; and the fact that information now being given does not seem to be necessary or useful. The judge should weigh all these circumstances and decide one way or the other. Advocates often invoke the fact that it would not be possible to say that the right to defense was denied. And this is a reason that a judge must always consider.

d) As far as the weight of new testimony is concerned, we should say that as a rule in jurisprudence, original testimony is more reliably accepted than subsequent testimony, unless there is an evident reason for rejecting the original testimony, which would be the case if a judge did not

1. Cf. A. JULLIEN, *Juges et avocats des Tribunaux de l'Église* (Rome 1970), p. 389.
2. Cf. c. 1760 *CIC*/1917; *PrM* 124.

properly examine a witness or a notary did not properly transcribe a witness's testimony (which would be unusual if the norms were followed).[3]

Returning to a spontaneous witness for a moment, it is not unusual for a witness to feel remorse after testifying if he or she gave false testimony and said what he or she was told to say. Re-testifying before the judge and notary is an easy solution. But the situation becomes more complicated if a witness fears grave harm from the litigant that asked him or her to give false testimony when the litigant discovers the witness's judicial retraction. It is true that a judge may impose confidentiality on the advocates and procurators in cases like this (c. 1455 § 3), but one can never be certain that the confidentiality will not be broken. For this reason, a witness may have reason not to tell the whole truth when testifying again.

In principle, these statements, if not faithfully recorded, cannot be considered evidence: *Quod non est in actis, non est in mundo.* The judge must base his/her decisions *ex actis et probatis.* However, if the judge deduces under all the circumstances that a witness's re-testimony revoking his or her original testimony is true, it is not easy to attain moral certainty on the veracity of the original testimony. This could be a reason for submitting all evidence to serious criticism by asking the other witnesses to re-testify. Refusal to re-testify if so instructed by the interested party could have very specific meaning for the judge. This is the specific case that arises for the judge if on the basis of personal knowledge he/she reaches different conclusions than he/she would reach *ex actis et probatis.* The judge has several ways to obtain new evidence confirming the historical truth which he/she finds to agree with his/her personal knowledge. If he/she cannot obtain such evidence, he may doubt his personal knowledge.[4]

3. Cf. c. STAFFA, February 28, 1958, in *SRR Dec* 50 (1958), p. 106, no. 2; c. SABATTANI, July 24, 1962, in *SRR Dec* 54 (1962), p. 459; c. PINNA, October 29, 1963, in *SRR Dec* 55 (1963), pp. 690ff; c. PALAZZINI, March 5, 1964, in *SRR Dec* 56 (1964), p. 165; c. EGAN, March 2, 1974, in *SRR Dec* 66 (1974), p. 165.

4. Cf. P. FELICE, "Formalità giuridica e valutazione delle prove nel processo canonico," in *Ephemerides Iuris Canonici* 41–42 (1985–86), pp. 13–14.

1571 **Testibus, iuxta aequam iudicis taxationem, refundi debent tum expensae, quas fecerint, tum lucrum, quod amiserint, testificationis reddendae causa.**

Witnesses must be refunded both the expenses they may have incurred and the losses they may have sustained by the reason of their giving evidence, in accordance with the equitable assessment of the judge.

SOURCES: c. 1787; *PrM* 127 § 3

CROSS REFERENCES: cc. 1629, 4°; 1649 § 2

COMMENTARY

Feliciano Gil de las Heras

The general principle of this canon is that witnesses should be compensated for expenses incurred in appearing to testify and wages lost while appearing at the tribunal.

The canon recognizes witnesses' right to this compensation, but it does not impose on a judge the corresponding obligation of compensating witnesses, or at least it does not say anything about any provision for compensating witnesses. It does give a judge the faculty to assess an equitable amount to be received by a witness to cover the foregoing expenses.

It is true that everyone has an obligation to cooperate to further justice and that therefore no one may demand any fees whatever. But neither is it equitable that anyone should suffer harm for their cooperation. The compensation mentioned in the canon is not a payment for cooperating to further justice, but rather compensation for expenses incurred for travel, lodging, etc., and wages lost during the time a witness is unable to be at work.

The law of the decretals prescribed that witnesses be paid for travel and lodging expenses.[1] *CIC*/1917 retained this norm, as does the *CIC*, with certain changes. There has not always been uniformity among the authors on compensation, since some maintained that only the poor should be compensated for these expenses. The *CIC* makes no distinction whatever.

In practice, as far as this whole matter is concerned, there are few cases in which a judge intervenes to handle the compensation of witnesses, either because witnesses do not claim compensation or because

1. Cf. *X* I, 3, 11 § 8.

the witnesses make an agreement with the parties who presented them. The legislator, being aware of this, updated the norm to apply only to cases in which the parties have not come to an agreement. Then it is the judge who sets the amounts owed for the various expenses.

It should not be difficult for a judge to determine an amount of expenses incurred in the case. It is a matter of submitting bills. It is more complicated to determine wages lost because a witness had to miss work to testify. In this case, a judge may use an expert to assess the amount of lost wages.

If the parties and the witnesses disagree on an assessment made by the judge, they may bring the issue back to the same judge, as in the case of pronouncement regarding expenses (c. 1649 § 2), within 15 days, and the same judge may uphold or modify the assessment. It is clear that the judge's decree may not be appealed (c. 1629, 5°). If the sentence is appealed, the appellate judge may also review the pronouncement.

What happens if the parties do not pay the amount set by a judge to compensate witnesses? *CIC*/1917 authorized judges to request money from the parties to cover the expenses, and if the parties failed to do so within the prescribed time, it was assumed that said parties had renounced the examination of the witnesses (c. 1788). The *CIC* says nothing about this. This may be taken to mean that the legislator does not want judges to take this action. Once an assessment has been made by a judge, is it up to the witnesses to resolve the matter with the means available to them? There would not always be certainty that a civil judge would agree to order compensation decreed by an ecclesiastical judge, at least under current legislation. The matter should be settled before giving testimony. This would be a way to guarantee compensation if compensation is asked for.

ART. 4
De testimoniorum fide

ART. 4
The Credibility of Evidence

1572 **In aestimandis testimoniis iudex, requisitis, si opus sit, testimonialibus litteris, consideret:**

1° quae condicio sit personae, quaeve honestas;

2° utrum de scientia propria, praesertim de visu et auditu proprio testificetur, an de sua opinione, de fama, aut de auditu ab aliis;

3° utrum testis constans sit et firmiter sibi cohaereat, an varius, incertus vel vacillans;

4° utrum testimonii contestes habeat, aliisve probationis elementis confirmetur necne.

In weighing evidence the judge may, if it is necessary, seek testimonial letters, and is to take into account:

1° the condition and uprightness of the witness;

2° whether the knowledge was acquired at first hand, particularly if it was something seen or heard personally, or whether it was opinion, rumour or hearsay;

3° whether the witness is constant and consistent, or varies, is uncertain or vacillating;

4° whether there is corroboration of the testimony, and whether it is confirmed or not by other items of proof.

SOURCES: c. 1789; *PrM* 136, 138 § 1; CPAC Rescr., 28 apr. 1970, 16; SCDS Instr. *Dispensationis matrimonii*, 7 mar. 1972, II b (*AAS* 64 [1972] 248)

CROSS REFERENCES: cc. 1536, 1550, 1555, 1570, 1573, 1600

COMMENTARY

Feliciano Gil de las Heras

A change that has taken place in the *CIC*, namely, placing testimonial evidence after documentary evidence, should be noted: testimonial evidence came first in *CIC*/1917. In revising *CIC*/1917, following the criteria of placing the more important evidence first, so that documentary evidence comes second, after the declaration of the parties, which statements were considered more important.[1] Further, we should note that no other kind of evidence is prone to so many difficulties and dangers. From this flows the need for the judge's wisdom to know how to use and weigh this evidence. We would like to give special emphasis to the works of Mons. León del Amo,[2] the great proceduralist on this subject.

In order to evaluate witnesses, there are assessment principles and methods. There are two methods: the so-called *legal method* and the *independent evaluation* method. The independent method of evaluating testimony comes from Roman law. In this method, the judge enjoys the freedom to evaluate evidence. In the legal evaluation method, which comes from the Germanic influence that prevailed during the Middle Ages, it was the law that determined the weight of each piece of evidence, and the judge was bound by this evaluation. Each system has its advantages and disadvantages. In the legal evaluation system, the judge often has to proceed against his conscience. In the independent evaluation method, the judge runs the risk of making arbitrary, subjective or mistaken evaluations, with the ensuing confusion.

Modern codes have now adopted an eclectic or mixed system. There is evidence that is subject to independent evaluation by a judge, and there is other evidence that has already been evaluated by the legislator. This is the system that has been adopted in the *CIC*. We should acknowledge that there are few norms that restrict a judge from exercising his/her independence in evaluating evidence. Some examples may be seen in cc. 1536, 1550 and 1573, as well as canons on legal presumptions. In general, however, the legislator reminds the judge that he/she should be certain about what is alleged and what is proved; he/she should evaluate evidence according to his/her conscience; and he/she should respect norms on the efficacy of certain evidence (c. 1608).

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1. *Comm.* 8 (1976), p. 189.
2. Cf. L. DEL AMO, "Valoración del peritaje psiquiátrico sobre neurosis, psicopatías y transtornos de la sexualidad," in *Ius Canonicum* 23 (1982), *passim*; idem, *La clave probatoria en los procesos matrimoniales (Indicios y circunstancias)* (Pamplona 1978). Also see U. NAVARRETE, "De aestimatione testimoniorum in processu canonico," in *Periodica* 58 (1969), pp. 755–757.

Canon 1572 provides some principles for evaluation in its four paragraphs. They are not to limit a judge's freedom, but rather to serve as guidelines/norms that may help a judge to better carry out his mission.

a) In no. 1°, the canon says that a judge should determine the "condition and uprightness of the witness." There are many considerations that may enter into such a determination. Some may arise from a witness's answers to the general questions. Others appear in the reports or testimonial letters mentioned in the canon. The rest must be discovered by the judge in the witness's testimony. The judge should determine a person's "condition" by ascertaining whether he or she is: a cleric or a layperson; married or single; independent or dependent on other persons, especially the party introducing the person as a witness; whether he or she has an interest in favoring one of the parties; has a friendship, kinship or social connection with the litigants; is introverted or extroverted; tends to lie; notices details in perceiving events; has a good memory; is a perjurer; is suspect or has been coached or informed; is spontaneous, complacent, etc.

We mentioned "testimonial letters" as one way of determining the condition of a witness. The *CIC* does not direct that these letters be requested. The judge will request them if he deems them necessary and useful. *Provida Mater* 138 prescribed obtaining evidence on the religiousness, uprightness and credibility of witnesses. Ordinarily, parish priests were asked for testimonial letters, but others could also be asked. These letters are often of little use because parish priests do not know the witnesses, due to the number of parishioners they have. Other times, it might be thought that the information could be obtained by the interested parties. In any case, testimonial letters should be weighed with caution.

We mentioned age as a factor to be learned in judging a person's condition. Sometimes, the age is omitted in the instruction, to the notable harm of a proper instruction. Age is an important point of reference in determining whether a witness was able to perceive events at the time they occurred.

We also mentioned independence. This is a factor that should be seriously taken into account when evaluating testimony. Subordinates may not enjoy the liberty of testifying against a superior on whom they depend. They are not suspect witnesses, but their testimony loses probative value for this reason, and more so if it seems that such a witness desires to please the person on whom he or she depends. Jurisprudence mentions decisions where this phenomenon stands out.[3]

Likewise we mentioned friendship/enmity because of the influence it may have on a witness's bias. It cannot be said that friendship with a party in itself makes a witness's testimony biased. Indeed, in matrimony cases, relatives and friends are the ones who are familiar with the facts. Nor can

3. Cf. c. FELICI, March 30, 1949, in *SRR Dec* 41 (1949), p. 141, no. 7.

it be denied how easy it is for a witness who is a friend to be influenced by his or her interest in favoring the friend. The legislator rightly directs judges not to hear cases of the judge's own close friends (c. 1448). Likewise, it is easy for an enemy with profound enmity to testify passionately to harm a party. The third law of the digest prescribed due consideration of "an inimicus ei sit, adversus quem testimonium fit, vel amicus ei sit pro quo testimonium dat"[4] when weighing a witness's credibility.

b) Determining the honesty of witnesses is another requirement imposed on the judge, since it is relevant in evaluating testimony. Honesty includes uprightness in morals and whether a person has perjured himself on another occasion. Perjury is the case if a witness testified to something under oath in his or her pre-matrimony statement and then contradicts it in the trial, particularly if it was certified that the statement was given solemnly and under oath. The least that can be concluded is that the witness lied on one occasion or the other. One must either demand arguments that allow no exception to overcome such a situation[5] or perhaps it would be better to discount such witnesses under the principle that *semel medax, semper mendax.*[6] *Testibus periuriis nulla fides*[7] is also a well-known maxim of experience and juridical aphorism. It is certainly true that in social life, sworn statements are given in non-religious matters that are not the equivalent of taking an oath in the religious sense.[8] And as far as the *semel mendax, semper mendax* principle is concerned, rotal jurisprudence often says it has many exceptions and thus should be applied on a case-by-case basis.[9] At any rate, it cannot be denied that the fact that someone has lied is grounds for questioning whether he or she is telling the truth now.

CIC/1917 said of witnesses with poor morals that they should be considered suspect (c. 1757 § 2). The *CIC* has deleted this. In reality, an immoral person as such is not incompatible with the truth.[10] The judge can weigh such a person's testimony in its internal and external context.

c) Another principle that the legislator reminds judges to consider when weighing testimony is whether a witness is testifying from his own knowledge. Anyone who has seen the thing he testifying about or heard it directly from the person who did it is testifying from his own knowledge. Witnesses may therefore be first-hand or second-hand witnesses. First-hand witnesses are also known as eyewitnesses because they have seen or heard a thing with their own eyes or ears. These are the witnesses that can best provide full proof. Their testimony should consist of relating or

4. *De testibus*, XXII, 5.
5. Cf. c. FILIPIAK, May 11, 1949, in *SRR Dec* 41 (1949), p. 215, no. 6.
6. Cf. c. JANNASIK, May 27, 1939, in *SRR Dec* 31 (1939), p. 336.
7. Cf. ibid.
8. Cf. L. DEL AMO, "Valoración...," cit., p. 207.
9. Cf. c. MATTIOLI, January 15, 1959, in *SRR Dec* 51 (1959), p. 24, no. 2.
10. Cf. c. JULLIEN, May 13, 1932, in *SRR Dec* 24 (1932), p. 174, no. 10.

telling their story of what they saw or heard, including specific details. Sometimes testimony by eyewitnesses does not turn out to be so efficacious, due in large part to the fact that they limit themselves to general statements without saying anything specific, such as, "I saw him/her with my own eyes" or "I heard him/her directly." The method of having witnesses tell their story is of great importance to every witness. It would be a pity if these witnesses limited themselves to testifying only about their opinions, conjectures or deductions when they know much more.

In these cases, criticism of such testimony should be directed toward determining whether the witness really saw or heard something, whether the witness is deceiving himself/herself because he/she suffers from some mental anomaly, or whether he is trying to deceive the judge. It will not be difficult for a clever judge to discern the difference. And the best way to discern the difference is to ask the witness to relate what he or she saw or heard. The judge should not forget that in testimonial evidence, a witness's authority flows from his/her own knowledge and truthfulness. Both these factors should be scrutinized.

d) Second-hand witnesses are a diverse group, because the sources of their knowledge are so diverse. They may have heard something from the petitioner or the respondent; a third person; or a rumor, or they may have learned something that is generally known.

If a witness says he or she heard the petitioner or the respondent, the entire value of his or her testimony depends on two issues: whether he or she really heard it and whether the petitioner or the respondent was telling the truth when they said it. To determine the first issue, the judge has the resources available to him/her under the positive norm and jurisprudence: investigating thoroughly; asking the witness to describe in detail how he/she saw or heard what he/she is testifying about; and encouraging him/her to tell his story about what he saw or heard, including all the details he/she can remember. If a witness is certain about the details and if his/her testimony corroborates testimony given by other witnesses, he/she is a witness that is telling the truth. The second issue will be determined by the judge when he/she weighs all the evidence: the parties' statements, the other witnesses' testimony, the circumstances beforehand, during and afterward; circumstantial evidence, conjectures, presumptions, etc.

Two extremes must be avoided in weighing testimony: giving full credence to certain testimony because it was heard directly from the simulating party, for example, and not giving any credence at all to testimony heard from the petitioner. In both cases, testimony must be compared with the other evidence.

If the source of second-hand testimony is a third person, the entire value of such testimony depends on the credibility of the person(s) from whom something was heard, assuming the witness's credibility has been established. The extreme of underestimating testimony as if it had no

weight at all by virtue of its third-party source must also be avoided. But the weight of such testimony also depends on how it was given: whether the witness gave details of time, place, names, motive, etc. The more specific the detail, the greater the weight this testimony may have, because then it can be compared with other witnesses' testimony. If a second-hand witness's testimony is limited to some general statements, just saying he heard someone say something without adding anything else, it is clear that such testimony has little weight. However, it may lend credence to other evidence that meets the requirements for proper testimony, as mentioned above. It is important that witnesses testify by telling their story. If in these cases, their testimony is consistent with circumstantial evidence, additional evidence and presumptions, it may be considered full proof.[11] Such testimony may always be grounds for making presumptions. In rotal jurisprudence, witnesses that have heard something from third parties are not ordinarily admitted. But they are admitted when there are no first-hand witnesses, mainly in marriage cases, and they may be credible if they can strengthen their testimony with conjectures and presumptions or other evidence, provided the source of their knowledge merits credence and was heard at a time that is not suspect.[12]

If a person's source of knowledge is rumor, he or she is a so-called hearsay witness. Rumor is different from hearsay. Rumor is suspicion based on talk among people whose source and basis are unknown. It is clear that such witnesses do not merit any credence whatever. This is not to say that they cannot be trusted, but merely that one of the requirements for the value of their testimony is missing, since the source of their knowledge is unknown. Rumor offers no guarantee of a serious basis for truthfulness.[13]

A hearsay witness is different. Hearsay is a general agreement about some fact among local people. In order to adduce hearsay, it is necessary to show that this general feeling is uniform, sound, clear and enduring, and is not lightly taken or contradictory.[14] It is not enough for a witness to say that a general feeling exists: it must be proved. The following requirements must be met to do so: there must be two witnesses free of all suspicion; they must testify under oath that they heard the event as it is understood by the majority of the town, neighborhood, area of the city, etc.; they must mention at least two other persons from whom the witnesses have heard it; and they must give the causes of their knowledge and the talk or reason people have to believe what is being spread as everyone's opinion, for example, whether people who witnessed it and the

11. Cf. c. MATTIOLI, November 7, 1951, in *SRR Dec* 43 (1951), p. 690, no. 2.
12. Cf. c. PINTO, June 17, 1974, in *SRR Dec* 66 (1974), p. 447, no. 4.
13. Cf. c. JULLIEN, June 6, 1935, in *SRR Dec* 27 (1935), p. 21, no. 3.
14. Cf. A. REIFFENSTUEL, *Ius canonicum universum*, L. II, tit. XX, nos. 393ff.

attending circumstances are known.[15] Unless these conditions are met, it is just rumor. Thus we see that it is not easy to prove hearsay.[16] And even if these requirements are met, additional evidence is needed for hearsay alone to constitute full proof, unless the facts are extremely difficult to prove.[17]

e) Witnesses of opinion are expressly mentioned in c. 1572,2°. They are also known as credible witnesses. They do not relate facts or even make statements: they just give their opinion, i.e., what they themselves think about the fact in dispute. The probative value of these witnesses lies in the basis for their opinions and deductions. They may constitute full proof if strengthened by additional evidence, conjectures and presumptions. In any case, their testimony may be a valuable indication. But we must admit that these are not witnesses with the purpose proper to witnesses, which is to report facts, not opinions.

f) A consistent witness that does not contradict his own testimony. This is another principle that a judge must follow in weighing testimony. A witness is consistent if he or she firmly maintains the fundamental facts when testifying, although there may be incidental discrepancies. If a witness does not make incompatible statements, i.e., if some facts complement rather than contradict other facts, the witness is firmly consistent. He must be consistent on the fundamental facts.

g) A contradictory witness is not consistent or coherent with his own story. This is also a principle for evaluation. A witness who says one thing and then contradicts it with something else in the same testimony is a contradictory witness. These are also contradictions. The discovery of contradictions in a witness casts suspicion on his or her credibility. However, a judge should not dismiss contradictions *a priori*, but rather try to see if they fit into a pattern and attempt to discern what the witness was trying to say and interpret his state of mind. A few incidental variations in testimony may be due to normal things and actually strengthen rather than weaken credibility if they indicate that the witness has not been tipped off or coached.

In the case of a contradictory witness, it is necessary to consider not only discrepancies in his or her testimony given on one or more occasions, but also his or her quickness or slowness in correcting himself/herself or changing his/her testimony; and whether testimony given on more than one occasion was taken in an ecclesiastical trial or in an ecclesiastical trial and a civil trial; or whether the discrepancies occurred between statements made in and outside the trial. It is clear that a judicial statement made under oath should prevail over an extra-judicial statement;

15. Cf. L. DEL AMO, "Valoración...," cit., p. 67; c. WYNEN, January 16, 1936, in *SRR Dec* 28 (1936), p. 19, no. 4.
16. Cf. c. CANESTRI, August 5, 1943, in *SRR Dec* 35 (1943), p. 688, no. 4.
17. Cf. *X* II, 20, 27; c. PRIOR, December 12, 1921, in *SRR Dec* 13 (1921), p. 7, no. 6.

that testimony given in a civil trial merits less credibility than testimony given in an ecclesiastical trial, given the interrogatory method used in the civil system; and that testimony given by recalled witnesses are subject to the dangers mentioned in cc. 1570 and 1600. With respect to a witness's revocation of testimony, the timing of the revocation should be considered: i.e., whether during testimony or when affirming it; whether it was after the act was read or whether the witness spontaneously returned to the tribunal to correct it; whether the witness had no time to talk to anyone about his testimony or did have time and talked about it; and whether the witness gave a reasonable explanation for making the correction.

h) An uncertain or hesitant witness may also be a factor in evaluation, since a witness's uncertainty can hardly inspire certainty on the part of the judge. A witness who testifies uncertainly, expressing doubt of his own statements, fearful of making a mistake, is called an uncertain, hesitant witness. Clearly, the judge should determine the source of such uncertainty and hesitancy. If it is due to timidity, nervousness, scrupulousness, etc., this is different from confusion or a poor memory.

i) The principle of consistency with other testimony brings us to the witness that confirms other testimony. Full proof is not obtained by accumulating many witnesses, but from witnesses who know the facts first hand and give testimony that agrees at a trial, with no significant discrepancies. *Testes non numerantur, sed ponderantur* is an aphorism that is well-known. Thus, there may be confirming witnesses and singular witnesses in a trial. Confirming witnesses are those who, without exception, testify on facts they know first hand, in agreement with each other and without major discrepancies. On the other hand, singular witnesses are those who each testify on different facts such that only one of them testifies to a specific fact.

Confirming witnesses provide full proof. This doctrine, which goes back to ancient times, is found in the Old Testament[18] and in Roman law[19] and it has been adopted in all the codes. This is true even when there are only two or three such witnesses, unless the gravity of the case demands stronger evidence or there is circumstantial evidence that raises enough doubt for the judge to consider the evidence insufficient (cf. c. 1791 *CIC/* 1917). It is a general principle in jurisprudence that witnesses who conflict on the fundamental matter do not constitute proof. But this principle does not apply if the conflict is over an incidental matter. Further, those witnesses whose testimony agrees in even the most incidental details may be suspected of having been coached.

Singular witnesses may be of various kinds: adversarial or oppositional if their testimony is squarely opposed; diverse if their testimony differs but does not conflict, i.e., the testimony is on facts that are not related

18. Cf. Deut 19; Mt 18:6; Jn 8:17; 2 Cor 13:1.
19. Cf. 1,12, D., xxii, 15.

to each other; or cumulative or admiculative if their testimony can be combined and unified, even though their testimony may be on different details. Different principles must be used to weigh this evidence, because they are different cases. In the event of an adversarial conflict, what one witness affirms is denied by another. It might be said that one witness nullifies the testimony of another. Only one witness is right. One of the two is lying. Neither one constitutes proof until it becomes clear who is telling the truth and who is lying.

In the event of diversative singular witnesses, no testimony nullifies another, but neither does it help, since the respective facts are not mutually exclusive and have no connection whatever with each other. Each witness retains the weight accorded to singular testimony. Such witnesses may be given the weight of additional circumstantial evidence. The saying that "a thousand witnesses like these is worth one" applies.

In cumulative singular testimony, the testimony is on details of the same fact or different facts that maintain a common line and may mutually support and complement each other. There is no doubt that such testimony may constitute sufficient evidence, if supported by other corroborating circumstantial evidence, presumptions and conjectures.[20] In more serious cases, such as marriage and criminal cases, such testimony would not be sufficient evidence.[21] The more serious the case, the clearer the evidence must be.

It should also be noted that there is sometimes a discrepancy in testimony that is more apparent than real. Some differences may be explained by the fact that some witnesses do not recall the facts as easily as others after some time has elapsed. If this is the case with respect to incidental details, the testimony must not be underestimated. A judge would do well to remember the principles of jurisprudence in: *Dicta testium non sunt cavillanda, sed intelligenda secundum usum communem, humanum, Testimonia modo humano sumenda sunt nec omnes discordantiae circa facti adiuncta ea infirmantur.*

It should be pointed out that witnesses prove their point by affirming a matter, not by denying it. This is the source of the general norm in jurisprudence that *Magis creditur duobus testibus affirmando quam mile negantibus*. An excessive number of witnesses reduces efficiency, since contradictions and inconsistencies increase as the number of witnesses increases, which harms the evidence.

In evaluating witnesses, it is fundamental to review each witness and his or her statements. What a judge should never do is list a number of witnesses and their respective statements in a decision with no criticism

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20. Cf. F. DELLA ROCCA, *Instituciones de derecho procesal canónico* (Buenos Aires 1950), p. 226, which cites the jurisprudence of the Rota.
21. Cf. L. DEL AMO, "Valoración...," cit., p. 127.

whatever, as if the weight of their testimony lies in the sum of the testimony alone. An analysis must be made of what was said, what was omitted, what seems true, and what is consistent or out of line with other testimony or the facts. Each witness's testimony must be compared with the parties' statements and the other witnesses' testimony, and these with the testimony of the witnesses who know more than the parties themselves in areas that only they could know or say they have not talked to anyone about it.

Nor does criticism consist of picking and choosing from what each witness says in order to support a theory. The important thing in each witness's testimony is the fact that he or she wants to describe or reveal.

A judge must also avail himself of historical criticism by determining the causes of the facts, how each witness learned of what he testified to and any interest he or she may have in the matter by discerning the incidental and the fundamental and distinguishing between what seems to be the objective truth and what seems to be highly probable or false due to conjectures and deductions. While exercising neither excessive subtlety nor unwarranted underestimation, a judge must be cautious, prudent and human.

j) "Other items of proof," says c. 1572,4°, must be weighed to determine whether they confirm the witnesses' testimony. This is what we would call the principle of comprehensive evaluation.[22] It consists of putting together all the elements obtained in the investigation, which will be quite varied in every case. These elements may be summarized as follows: circumstances preceding, concomitant with and following the facts; circumstantial evidence, which provides information on the facts in dispute; conjectures, which are less significant presumptions with fewer bases than presumptions; presumptions; maxims of experience, etc.[23] The principle of the comprehensive evaluation of evidence is grounded on the well-known maxim of experience, *Singula quae non prossunt, unita iuvant.*

This comprehensive evaluation presupposes three steps to be taken by the judge: analysis of each piece of evidence; criticism of it in "modo humano" and a synthesis of the evidence as a whole. This requires carefully rereading the acts and taking extensive notes.[24]

Sometimes circumstantial evidence may be important enough to arrive at moral certainty on the facts in dispute. Jurisprudence itself avails itself of circumstantial evidence more and more frequently and firmly. There is no doubt that it is additional evidence of great importance, and at

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22. Cf. L. DEL AMO, *La clave...*, cit., pp. 154ff.
23. Cf. ibid.
24. Cf. J. A. ABBO, "Quaestiones quaedam circa probationes in causis matrimonialibus," in *Periodica* 59 (1970), pp. 3–20.

times it may be the only evidence. Testimonial evidence often needs to be complemented with circumstantial evidence.

CIC/1917 did not discuss circumstantial evidence as proof. The word was mentioned only in different canons, sometimes to mean a means of evidence and sometimes to indicate probative value.[25] A similar statement could be made for the *CIC*.[26] But in rotal jurisprudence, there are frequent occurrences of details, circumstantial evidence and conjectures as proof or additional evidence.[27] It must not be forgotten that the details are often the key to proof.[28] And it is in the details where circumstantial evidence is ordinarily found.

25. Cf. cc. 1757 § 3,2°, 1791 § 2, 1833, 1946 § 2,2°, 2059 of the *CIC*/1917.
26. Cf. cc. 1061, 1550, 1647, 1679, 1707 § 2 of the *CIC*.
27. Cf. c. FILIPIAK, September 17, 1949, in *SRR Dec* 41 (1949), p. 297, no. 2; c. HEARD, April 15, 1944, in *SRR Dec* 36 (1944), p. 266, no. 2.
28. Cf. L. DEL AMO, *La clave*..., cit., pp. 276ff.

1573 **Unius testis depositio plenam fidem facere non potest, nisi agatur de teste qualificato qui deponat de rebus ex officio gestis, aut rerum et personarum adiuncta aliud suadeant.**

The deposition of one witness cannot amount to full proof, unless the witness is a qualified one who gives evidence on matters carried out in an official capacity, or unless the circumstances of persons and things persuade otherwise.

SOURCES: c. 1791 § 1; *PrM* 136 § 1; Signatura Rescr., 10 nov. 1970, 1; Signatura Rescr., 2 ian. 1971, II, 1

CROSS REFERENCES: cc. 484, 876, 894, 1437, 1541

COMMENTARY

Feliciano Gil de las Heras

The general principle of this canon is that "one witness cannot amount to full proof." The principle has two exceptions: a qualified witness testifying to things done in his or her official capacity; and if objective or subjective circumstances argue otherwise.

The general principle of the canon is a limitation imposed by a more rigorous principle that goes back to ancient law: it was said that *Testis unus, testis nullus*, and it manifested itself in various ways,[1] although it is true that it was never applied rigorously, since a sole witness has always had some probative value. At any rate, in current bodies of law, this rigorous principle has become the one that appears in the canon we are now commenting on: "[One witness] cannot amount to full proof," but his or her deposition does have probative value.

The reason for this law is the danger that a single witness may not testify with sufficient sincerity or historical truth when it is so easy to make an error and when out of his or her own malice or others', he or she may be influenced to stray from or falsify the truth. The legislator intends for this norm to ensure that judges do not commonly accept a sole witness as full proof and that moral certainty not be based on a sole witness in arriving at a given decision. And this disposition of the legislator is shaped by the common sense itself of ordinary people, who does not see sufficient certainty to settle a dispute on the basis of the word of a single

1. Cf. cc. 1813, 1816, 373, 1593 of the *CIC*/1917.

person. But the legislator is well aware that a specific case may arise in which a single witness may provide sufficient moral certainty. The following exceptions are therefore given alongside the general principle:

a) A witness giving a deposition on things he or she has done by reason of his/her office may provide full proof, even if he or she is a sole witness. This exception is based on the fact that the mission of a qualified witness is to certify things he or she does in an official capacity. This is a person that has sworn to carry out his or her mission faithfully, and violation of this fidelity is considered a grave delict. Guarantees are thus in place to ensure that such witnesses will proceed with the uprightness that is demanded of them.

The question of how a witness is determined to be qualified may be asked here. Since a qualified witness in one "who gives evidence on matters carried out by reason of his/her office," we may mention, for example, notaries and clerks of the court; bishops and parish priests; judges and officials of the tribunal; and the promoter of justice and the defender of the bond. These officials are also exercising their legal authority and have full probative value when testifying to a judge about matters related to carrying out their mission, and not just when preparing public documents (c. 84). This norm is of great usefulness when a public document has been lost or destroyed or when there are questions over its interpretation.[2]

The *CIC* does not list cardinals of the Church as enjoying the privilege of being qualified witnesses in the external forum when testifying on concessions made orally by the Pope (cf. c. 239 § 1,17° *CIC*/1917). However the norm that one witness is sufficient to prove baptism (c. 876) has been retained. Yet, one witness would not be sufficient in the case of marriage nullity. The norm that one witness is sufficient to prove the sacrament of confirmation has also been retained (c. 894).

It is clear that exceptions and evidence, depending on each case, may be applicable against the testimony of a qualified witness. For example, when it can be proved, that a notary was not present at an act he/she certified). Or evidence may be submitted showing that testimony given by a qualified witness is not true. It should be noted that in marriage cases, if a qualified witness testifies in favor of the nullity of the marriage, such testimony would not by itself be sufficient proof, since marriage enjoys the favor of law (c. 1060), and a sole qualified witness does not prevail over the favor of law.[3] Thus the credibility of such testimony is not absolute, as can be seen in the presumptive evaluation of public documents (c. 1541). Therefore, a judge must also subject the testimony of qualified witnesses to criticism. We should note that such witnesses may be mistaken, even

2. Cf. A. JULLIEN, *Juges et avocats des Tribunaux de l'Église* (Rome 1970), pp. 441–442; c. JULLIEN, June 25, 1941, in *SRR Dec* 33 (1941), p. 574, no. 4; c. ROSSETTI, May 31, 1917, in *SRR Dec* 9 (1917), pp. 124ff.

3. Cf. C. JULLIEN, November 16, 1942, in *SRR Dec* 34 (1942), p. 805, nos. 4–5.

when serving as witnesses of their office. An example is provided in this rotal decision: "When a witness that was present at a marriage testifies as a qualified witness, his/her testimony constitutes full proof, which shall prevail over other witnesses to the contrary, unless convincingly shown otherwise."[4]

b) The other exception to the general principle is when a sole witness is supported by objective and subjective circumstances that convince the judge that full proof exists. In rotal jurisprudence, these circumstances are "quoties occurrant forma aut coniecturae et praesumptiones ex circunstantiis."[5] Reiffenstuel adds these exceptions to the general principle: "The deposition of a sole witness is sufficient proof in cases in which many witnesses could not be found *by any means or only with difficulty.*"[6] In fact, the *CIC*, in including this exception, simply incorporated into the positive norm something that was already in jurisprudence and doctrine.[7] The rescript of the Apostolic Signatura of November 10, 1970 said that "to obtain moral certainty from a concurring deposition by credible parties, assuming there is no collusion of any kind, probative force against the bond of marriage must not be denied, provided there is at least one witness free of suspicion and there are concurring presumptions, circumstantial evidence and other additional supporting evidence."[8]

In any evaluation of testimony, the lessons of forensic psychology about evaluation must be considered in evaluating witnesses of any kind, but particularly when there is only one witness.

Even if it is assumed that the witness observed the fact faithfully and is a normal person who was not blinded by any passion, he or she may be subject to memory errors, since memory dulls with time. Psychological studies on judicial testimony have shown that the facts often took place a little differently from how witnesses related them, even when a witness feels sure that his or her memory is objective. Emotion itself may create

4. *Coram* EGAN, March 2, 1974, in *SRR Dec* 66 (1974), p. 165, no. 9; cf. c. QUATTROCOLO, March 14, 1933, in *SRR Dec* 25 (1933), p. 140, no. 10; c. BRENNAN, October 20, 1965, in *SRR Dec* 57 (1965), p. 693, no. 8; c. PINTO, June 17, 1974, in *SRR Dec* 66 (1974), p. 447, no. 4.

5. *Coram* PARISELLA, FEBRUARY 14, 1974, in *SRR Dec* 66 (1974), p. 89, no. 25.

6. A. REIFFENSTUEL, *Ius canonicum universum*, L. II, tit. XX, no. 267; cf. L. DEL AMO, "Valoración del peritaje psiquiátrico sobre neurosis, psicopatías y transtornos de la sexualidad," in *Ius Canonicum* 23 (1982), p. 129; M. LEGA-V. BARTOCETTI, *Comentarius in iudicia ecclesiastica*, II (Rome 1950), p. 742.

7. Cf. F. WERNZ-P. VIDAL, *Ius canonicum*, VI (Rome 1949), p. 440; M. LEGA-V. BARTOCETTI, *Comentarius...*, cit., p. 744; c. BRENNAN, April 17, 1960, in *SRR Dec* 52 (1960), p. 241; c. DAVINO, January 31, 1973, in *SRR Dec* 65 (1973), p. 50, no. 3; c. PARISELLA, January 11, 1979, in *SRR Dec* 71 (1979), pp. 3–4, no. 6; P. FELICE, "Formalità giuridica e valutazione delle prove nel processo canonico," in *Ephemerides Iuris Canonici* 41–42 (1985–86), pp. 17–18; A. FLATTEN, "Qua libertate iudex ecclesiasticus apretiare possit ac debeat," in *Apollinaris* 33 (1960), p. 198; U. MOISEK, "Der grundsad 'unus testis nullus testis' und seine geiltang in Kanonischen Recht," in *Revue de Droit Canonique* 26 (1976), pp. 370–377.

8. X. OCHOA, *LE*, IV (Rome 1974), cols. 5917 and 5963.

false memories and it is not rare for a witness to remember facts as true that the witness only wishes had happened.[9]

Thus a judge must not forget that a witness, especially if timid, may make errors if he or she is upset or becomes emotional, to the point that he or she may change his or her recollections if the instructor questions any of his or her testimony, or become even more confused as a witness and may falsify even the most exact recollections.[10]

The assistance provided by forensic psychology in weighing testimony is so important that it was considered in the *schemata* preceding the final text of the *CIC*. When weighing testimony, judges were asked to consider "the principles of forensic psychology." And this paragraph was deleted not because judges do not need such principles, but because these principles is part of the professional formation of judges.[11] Further, rotal decisions have been insisting on this for a long time: "When weighing testimony, the teachings of forensic psychology should always be considered. This is all the more necessary when only one witness testifies on events that happened a long time ago and a matter that was of much interest to the witness."[12] Forensic psychiatry/psychology courses are necessary in today's canon law schools. Judges need this knowledge not only for critical reviews of psychiatric and psychological expert testimony, but also to weigh testimony.

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9. Cf. F. ROBUSTELLI, *Nuove questioni di psicologia*, I, L. (Ancona 1972), p. 399; E. ALTAVILLA, *Psicologia iuridica*, I (Turin 1955), p. 85; J.J. GARCÍA FAÍLDE, "Criteria psicologica ad aestimandas partium declarationes in processibus ecclesiasticis," in *Periodica* 79 (1990), pp. 393–420; L. DEL AMO, *La clave probatoria en los procesos matrimoniales (Indicios y circunstancias)* (Pamplona 1978), pp. 209ff.

10. Cf. E. ALTAVILLA, *Psicologia...*, cit., p. 111; J.J. GARCÍA FAÍLDE, *Nuevo derecho procesal canónico* (Salamanca 1992), p. 159.

11. Cf. *Comm.* 11 (1979), p. 120.

12. *Coram* PINTO, April 22, 1974, in *SRR Dec* 66 (1974), p. 275, no. 6.

CAPUT IV
De peritis

CHAPTER IV
Experts

1574 **Peritorum opera utendum est quoties ex iuris vel iudicis praescripto eorum examen et votum, praeceptis artis vel scientiae innixum, requiruntur ad factum aliquod comprobandum vel ad veram alicuius rei naturam dignoscendam.**

The services of experts are to be used whenever, by a provision of the law or of the judge, their study and opinion, based upon their art or science, are required to establish some fact or to ascertain the true nature of some matter.

SOURCES: c. 1792; *PrM* 140 § 1

CROSS REFERENCES: c. 1680

COMMENTARY

Kenneth E. Boccafola

The Code of Canon Law wisely contains various provisions which recommend the use of experts whenever such help might be useful or necessary to determine a particular fact or to understand the nature of a particular matter. An expert is one whose knowledge and experience make him an authoritative specialist in some art or science. The figure of expert in canon law, therefore, is quite a broad one[1] and ranges from one who can advise about the restoration of a work of fine art (c. 1189), or about architecture or building repair (c. 1216), or about the value of real estate

1. Cf. M. BREITENBECK O.P., "The requirements for Experts in Church Law," in *The Jurist*, 50 (1990), pp. 257–288.

(c. 1293 § 1,2°), to someone with proven experience either in the field of economics, civil law (c. 492 § 1), or even canon law itself (c. 1483). Last but not least, of course, is the expert whose opinion and expertise is most frequently sought, the medical doctor (c. 689 § 2) and/or psychiatrist (c. 1044 § 2,2°).

Canons 1574 to 1581 of the Code, which we are considering here, however, deal with only one specific aspect of this large subject, that is, the use of experts as *a source or means of proof* in a canonical trial.

This canon, in the same fashion as that of c. 1792 *CIC*/1917, sets out the *general norm that a judge is required to make use of the help and opinion of experts*: a) whenever, after a prudential judgment that such help would allow him to reach moral certitude as to the establishment of some fact or as to the true nature of some matter, he, by his decree has so determined, and b) when the law itself so prescribes.

The present law requires that experts be consulted in several different circumstances, e. g., when a superior must decide whether or not a physical or psychic illness would render a member of a religious institute unsuitable to profess final vows (c. 689 § 2), or when a bishop must decide whether or not a candidate is irregular for Orders because he labors from some psychic defect which would make him incapable of rightly carrying out priestly ministry (cc. 1041,1°, 1044 § 2,2°). However, the only specific requirement for the use of experts *as a means of proof in a canonical trial* is found in c. 1680, which determines that experts must be used in matrimonial cases that are concerned with *impotence or defect of consent due to mental illness*.[2]

Accordingly, the legislation of the prior Code (cc. 1976–1982 *CIC*/1917) which treated together the requirements for expert examination and opinion in impotence, amentia and non-consummation cases has been re-ordered. The former two types of cases are now covered in c. 1680; non-consummation cases are dealt with in a separate section of Part III of *Liber* VII (cc. 1697–1706) where c. 1702 bids the judge to follow the general canons on proofs (c. 1526–1586) as well as the specific canons on proofs in matrimonial nullity cases (cc. 1678–1680).

In accord with the provisions of c. 1680, then, it would seem that a judge should make use of the help of experts in any case whose *caput nullitatis* would be based on c. 1095, for all of the three clauses of c. 1095 are concerned with a psychic incapacity for matrimonial consent, and the supreme legislator has recently made clear that such a psychic incapacity can truly be envisioned only in the presence of a serious anomaly affecting the ability to know and to will: "Per il canonista deve rimanere chiaro il

2. Cf. A. STANKIEWICZ, "La configurazione processuale del perito e delle perizie nelle cause matrimoniali per incapacità psichica," in *Monitor Ecclesiasticus*, 117 (1992), p. 220, no. 9.

principio che solo la *incapacita'*, e non gia' la diffi*colta'* a prestare il consenso e a realizzare una vera communita di vita e di amore, rende nullo il matrimonio... *Una vera incapacità e ipotizzabile solo in presenza di una seria forma di anomalia che, comunque si voglia definire, deve intaccare sostanzialmente le capacità di intendere e/o di volere del contraente.*"[3]

Clearly the present Code is not as rigid in maintaining this requirement[4] as was the *CIC*/1917 code which, without exception, in c. 1982 provided for the intervention of experts *in causis defectus consensus ob amentiam.* Then, too, *Provida Mater* 140, considered the aid of an expert so important that it mandated that any dispute about the usefulness of an expert be decided, not by the Judge Instructor alone but by the college of judges. As is clear from c. 1680, the present law allows the judge to omit the appointment of an expert if *ex adiunctis inutilis evidenter appareat*, that is, if from the circumstances of the case such consultation would be manifestly useless.

A recent Rotal decision presents an interesting, though not yet solidly established, thesis as to when and why the opinion of an expert might be considered useless: "Possibilis alicuius gravis psychopathologiae praesentia est primum criterion quod vim apud iudicem habet, cum ille decernere debeat utrum opera periti—psychiatrici vel psycologici—utatur an non... Quare, si hic canon cum relata Summi Pontificis ... interpretatione [supra] confertur, peritus advocari debet tantummodo si extant aliqua indicia de praesentia cuiusdam gravis morbi ... Si rationabilia desunt indicia alicuius morbi, periti opera necessaria non est ... Sententia affirmativa, incapacitatem consensualem respiciens, exigit peritiam quae eam suffragetur; quia decisio affirmativa inniti debet in praesentia (medice quoque confirmata) anomaliae psychicae gravis; sententia vero negativa suffragium peritiae non requirit."[5]

In summary, the canon states that as a general rule in trials of the nullity of matrimony, a judge ordinarily cannot and should not prescind from seeking a *peritia*. However in particular cases (even if the case is based on a psychic defect), altogether special circumstances or an abundance of psychological or medical documentation may dispense the judge from seeking the ulterior proof of an expert's opinion.[6] He could also dispense with an expert's report if, in addition to considering it really an

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3. JOHN PAUL II, *Ad Rotae Romanae Auditores coram admissos die 5 februarii a. 1987*, in *AAS* 79 (1987), p. 1457.
4. A. STANKIEWICZ, "La configurazione processuale...," cit., p. 218, notes 2 and 3.
5. *Coram* BURKE, in TRR *Vayne-Castrens-Southbenden* June 18, 1991, nos. 6–7.
6. Cf. M. POMPEDDA, in R. SABLE (Dd.), *Incapacity for Marriage. Jurisprudence and interpretation: Acts of the III Gregorian Colloquium* (Rome 1987), pp. 209–210.

unnecessary extra proof, he should judge that it would cause a considerable hardship for one of the parties, or for the tribunal itself, because of the lack of suitable experts or because of the increased outlay of time and money. Certainly, however a judgment as to the presence of psychic incapacity would have to be based upon more substantial canonical proof than the mere "common estimation of the ordinary man."[7]

7. M. BREITENBECK, "The use of the Psychological expert in formal Cases," in T. DOYLE O.P. (Ed.), *Marriage Studies* II, 1982, p. 92.

1575 **Iudicis est peritos nominare, auditis vel proponentibus partibus, aut, si casus ferat, relationes ab aliis peritis iam factas assumere.**

It is for the judge, having consulted the parties or at their request, to appoint the experts or, if such is the case, to accept reports already made by other experts.

SOURCES: c. 1793; *PrM* 141

CROSS REFERENCES: —

COMMENTARY

Kenneth E. Boccafola

After determining in general when experts are to be used, the Code next concerns itself with the *selection* and *nomination* of experts in a particular case. We see first of all that one becomes an expert in a case only when one is officially designated as such by decree of the judge. The canon gives more liberty to the judge than c. 1793 *CIC*/1917 since it allows him either to appoint an expert on his own motion, after having heard the parties (and the defender of the bond or promoter of justice who, as we know from c. 1434, have the same rights as the parties) or to select an expert proposed by the parties. Furthermore he has the ability to officially accept as part of the canonical proofs an expert's report already drawn up and perhaps already presented to a civil court. The new Code also allows the judge more discretion as to the number of experts to be appointed in matrimonial cases since it no longer uses only the plural form and in c. 1680 specifically authorizes "*one* or more experts."

As he is about to nominate an expert, the judge should carefully consider the purpose he has in mind and the *qualities* of the one he is about to choose to help him fulfill that purpose. The qualities sought in the expert above all should be profound knowledge of the subject, a good reputation among his peers and personal integrity and honesty.

The expert in a matrimonial case should be a particularly qualified person chosen for his professional knowledge of the human sciences (psychiatry and psychology) who will furnish to the judge a reasoned opinion drawn up according to the professional norms of his art or science. He should possess to an eminent degree knowledge of his art or science and this knowledge should be recognized by a proper diploma or certificate of studies completed.[1] This is particularly important since the function of

1. Cf. P. MONTAIGNE, "Expertise," in R. NAZ, (Ed.), *Dictionnaire de droit canonique* V (Paris 1953), col. 705.

some experts is only to help establish a given fact, but in a matrimonial case the expert is to help the judge to fully understand the nature of the matter in question and to draw conclusions from the facts presented.

Historically, there have been various opinions as to the proper juridic *role* an expert plays in the trial and about the weight to be attributed to his conclusions. Some authors considered him almost as a delegated judge in the matter since he was asked to give an opinion in a judicial matter. He was referred to at various times as *arbiter*, *sapiens*, *assessor*, *consiliarius*, and *consultor*. Keating seems to favor the opinion that the office of the expert stands midway between that of a witness and a judge; like a witness the expert gives testimony in the trial, like a judge he draws conclusions and expresses his own opinion, something which an ordinary witness is not allowed to do. In the end he concludes that the role can best be expressed as "technical adviser to the Tribunal."[2]

2. J. KEATING, "The Province of Law and the Province of Forensic Psychiatry in Marriage Nullity Trials," in *Studia canonica* 4 (1970), p. 16.

1576 **Easdem ob causas quibus testis, etiam periti excluduntur aut recusari possunt.**

Experts can be excluded or objected to for the same reasons as a witness.

SOURCES: cc. 1795 § 2; 1796; *PrM* 142 § 2–145

CROSS REFERENCES: cc. 228 § 2, 1550 § 2,1° 1555, 1663 § 2 et 1664

COMMENTARY

Kenneth E. Boccafola

The discussion of the juridic role of the expert (see commentary on c. 1575) is further clarified by the dispositions of this canon which clearly places the expert in a position *equivalent with any other witness* in the case. This parallelism, taken together with recent jurisprudence[1] and authoritative interpretations make it clear that the expert is to be considered juridically as a witness, although a qualified witness;[2] "Il parallelismo tra periti e testimoni non significa in alcun modo che si voglia far rientrare le perizie nel campo delle prove testimoniali, ma indica un somiglianza della participazione del perito nella funzione di teste, specialmente nella sua posizione di dover riferire 'davanti' al giudice sulla stessa realtà del fatto."[3]

Canon 228 § 2 states the general norm that lay people who have the required knowledge, prudence and uprightness of character are capable of being experts. The *CIC* code does not list any positively required qualifications as did the c. 1795 *CIC*/1917. But like other witnesses and those mentioned in c. 1550, an individual would be considered incapable of fulfilling the ex officio role of expert if he has already assisted one of the parties in the same case (even if, as c. 1575 allows, the judge can accept such a private report in evidence). It would also seem that one who did not have sufficient knowledge to be a real expert, or who was closely related to one of the parties in the case, would be unsuitable to act as an ex officio expert (cf. *PrM* 142 § 3).

1. *Coram* DE LANVERSIN, March 20, 1985, no. 10 in *RRD* 77 (1985), p. 171.
2. B. DE LANVERSIN, "De momento peritiae instituendae in processibus matrimonialibus recentioribus," in *Periodica* 73 (1984), p. 573.
3. A. STANKIEWICZ, "La configurazione processuale del perito e delle perizie nelle cause matrimoniali per incapacità psichica," in *Monitor Ecclesiasticus* 117 (1992), p. 228.

The exclusion or rejection of an expert is done in the same way as the exclusion or rejection of a witness, that is, upon the request of one of the parties the expert may be rejected, provided that he has not yet begun his task and that a just reason for his exclusion has been presented (c. 1555).

The expert, once named, also has some rights and duties of his own. He should be sworn in to do his duty faithfully—an oath is no longer prescribed (as did c. 1791 *CIC*/1917), although it would seem that nothing prohibits the judge from swearing in the expert according to c. 1562. Before taking that oath, he should consider whether he wishes to accept the role, whether he is capable of carrying it out—that is, whether the information required falls within his sphere of expertise, whether he can fulfill the task objectively and within a reasonable period of time, and finally whether he will be able to produce a well reasoned opinion which will also explain how and why he reached his conclusions.

1577 **§ 1. Iudex, attentis iis quae a litigantibus forte deducantur, singula capita decreto suo definiat circa quae periti opera versari debeat.**

§ 2. Perito remittenda sunt acta causae aliaque documenta et subsidia quibus egere potest ad suum munus rite et fideliter exsequendum.

§ 3. Iudex, ipso perito audito, tempus praefiniat intra quod examen perficiendum est et relatio proferenda.

§ 1. The judge in his decree must define the specific points to be considered in the expert's task, taking into account whatever may have been suggested by the litigants.

§ 2. The expert is to be given the acts of the case, and any documents and other material needed for the proper and faithful discharge of his or her duty.

§ 3. The judge, having consulted the expert, is to determine a time for the completion of the examination and the submission of the report.

SOURCES: § 1: c. 1799 § 1; *PrM* 147 §§ 1 et 3
§ 2: c. 1800; *PrM* 147 § 2
§ 3: c. 1799 § 2; *PrM* 147 § 4

CROSS REFERENCES: —

COMMENTARY

Kenneth E. Boccafola

This canon establishes the duty of the judge to precisely define *the object of the inquiry and the specific task* which he is asking the expert to perform. Ordinarily psychiatrists and psychologists, in accord with the standards of their profession, are prepared to reach definite conclusions as to the state of a person only after having personally interviewed and/or treated that person. Oftentimes they make use of a series of psychological tests, and subject the patient to a period of close observation. The term *examen* used in the canon certainly envisions such a direct examination with the use of all relevant scientific aids. If this is not possible it would seem that an indirect examination, that is one based on the acts of the case (*perito remittenda sunt acta causae aliaque documenta et subsidia*), could suffice if the expert is thus truly able to reach morally certain conclusions.

As we have seen above, the use of the expert is a means of the instruction of the case in order to bring to light all possible proofs. Judges are often negligent in that they give only a general charge to the expert without clearly specifying the precise task that they require of him. This canon indicates that the judge is to determine by a decree the individual points upon which the expert is to concentrate his investigation. This decree is to take into account the various issues and questions raised by the parties and the defender of the bond (or the promoter of justice, if he intervenes). García Faílde[1] observes that requiring the consultation of the defender of the bond is omitted here, but as Doran says, it would seem that this is one of the situations envisioned by c. 1434.[2]

The judge is to ask the expert in marriage cases to determine the presence or not of any illness or psychic disorder, its nature, severity, onset and duration. He should give a diagnosis if this is possible and point out any influence such an illness or disorder might have on the mental state and capacity of patient.[3]

Keating describes the task of the expert as: "1. giving his diagnosis and to state his conclusions, i. e., whether the person was mentally ill, and, if so, what precise illness he had; 2. explaining to the court the basis for this conclusion, i. e., the examinations, tests, observations or other data on which he bases his conclusion; 3. describing the nature and characteristics of this illness; 4. explaining its origin, development and gravity in a temporal relationship to the date of the wedding."[4] He further maintains that the expert has the right to comment on the precise question of the validity of the marriage itself.[5]

However, such a thesis no longer seems tenable in the light of the Holy Father's recent statement: "Il giudice, quindi, non puo' e non deve pretendere dal perito un giudizio circa la nullita' del matrimonio ... La valutazione circa la nullita' del matrimonio spetta unicamente al giudice. Il compito del perito e' soltanto quello di prestare gli elementi riguardanti la sua specifica competenza, e cioe' la natura ed il grado delle realita' psichiche o psichiatriche, a motivo delle quali e' stata accusata la nullita del matrimonio."[6]

The expert has the right to have the information necessary for him to properly fulfill his task. The judge therefore is obliged to give the officially

1. Cf. J.J. GARCÍA FAÍLDE, *Nuevo derecho procesal canónico. Estudio sistemático-analítico comparado* (Salamanca 1984), p. 150.

2. T. DORAN, "Some Thoughts on Experts," in *Quaderni Studio Rotale* IV (1989), p. 64.

3. C. LEFEBVRE, "De peritorum iudicumque habitudine in causis matrimonialibus ex capite amentiae," in *Periodica* 65 (1976), p. 115.

4. J. KEATING, "The Province of Law and the Province of Forensic Psychiatry in Marriage Nullity Trials," in *Studia canonica* 4 (1970), p. 9.

5. Ibid., pp. 10 and 14.

6. JOHN PAUL II, *Ad Rotae Romanae Auditores coram admissos die 5 februarii a. 1987*, in *AAS* 79 (1987), pp. 1457–1458.

designated expert or experts, whether selected by himself or proposed by the parties, not necessarily *all* the acts of the case, but only such as are necessary to complete the task (cf. *PrM* 147 § 2).

As a practical matter and in order to obviate unnecessary delays, it is wise for the judge, and in accord with the expert, to set a time when the expert's report would be due.

1578 **§ 1. Periti suam quisque relationem a ceteris distinctam conficiant, nisi iudex unam a singulis subscribendam fieri iubeat: quod si fiat, sententiarum discrimina, si qua fuerint, diligenter adnotentur.**

§ 2. Periti debent indicare perspicue quibus documentis vel aliis idoneis modis certiores facti sint de personarum vel rerum vel locorum identitate, qua via et ratione processerint in explendo munere sibi demandato et quibus potissimum argumentis suae conclusiones nitantur.

§ 3. Peritus accersiri potest a iudice ut explicationes, quae ulterius necessariae videantur, suppeditet.

§ 1. Each expert is to complete a report distinct from that of the others, unless the judge orders that one report be drawn up and signed by all of them. In this case, differences of opinion, if there are such, are to be carefully noted.

§ 2. Experts must clearly indicate the documents or other appropriate means by which they have verified the identity of persons, places or things. They are also to state the manner and method followed in fulfilling the task assigned to them, and the principal arguments upon which their conclusions are based.

§ 3. The expert may be summoned by the judge to supply any further explanations which seem necessary.

SOURCES: § 1: c. 1802; *PrM* 148
§ 2: c. 1801 § 3; *PrM* 148 § 1
§ 3: c. 1801 § 2; *PrM* 152; Signatura Rescr., 10 nov. 1970, 2; Signatura Rescr., 2 ian. 1971, II, 2

CROSS REFERENCES: —

COMMENTARY

Kenneth E. Boccafola

The *CIC*, as we have seen above, removes the presumption (cf. *CIC*/1917, cc. 1792, 1796, 1979 §§ 1 and 2, 1982; as well as that of *PrM* 150). that there will always be more than one expert appointed. If, however, more than one expert is actually appointed, each should ordinarily prepare his report individually. In the rare case that a joint report is authorized, any differences of opinion among the experts are to be clearly distinguished.

It no longer seems required to seek the opinion of a 'super expert' (cf. c. 1803 *CIC*/1917), in the case of disagreement among the experts, since the judge, once the basic requirement of c. 1680 has been met—has ample discretionary power by reason of c. 1574 itself to make whatever further use or non-use of experts he deems necessary and proper.

Although the *CIC*/1917 mentioned, in c. 1801, the possibility that the expert might present his report orally, the present canon omits any reference to this possibility. It would seem, then, that the report should normally be drawn up in written form so that the expert will have had time to carefully reflect and organize his conclusions before presenting them in definitive form.

The canon also makes it clear that the expert cannot simply report his final conclusions, but that he must indicate his sources of information, the method he followed in carrying out the task and the arguments upon which his conclusions are principally based.

Once the report has been presented, the parties in the case (including the defender of the bond and promoter of justice), as part of their natural right of defense, should be able to consider its arguments and evaluate it as a means of proof. Hence it is often helpful for the expert to personally appear before the tribunal to confirm his findings and to respond to any criticisms or questions that may have arisen. It must be admitted, however, that the present Code, presuming that the parties are ably represented by advocates, does not permit their presence at the examination of the experts (c. 1678 § 2).

1579 **§ 1. Iudex non peritorum tantum conclusiones, etsi concordes, sed cetera quoque causae adiuncta attente perpendat.**

§ 2. Cum reddit rationes decidendi, exprimere debet quibus motus argumentis peritorum conclusiones aut admiserit aut reiecerit.

§ 1. The judge is to weigh carefully not only the experts' conclusions, even when they agree, but also all the other circumstances of the case.

§ 2. When he is giving the reasons for his decision, the judge must state on what grounds he accepts or rejects the conclusions of the experts.

SOURCES: § 1: c. 1804 § 1; *PrM* 154 § 1
§ 2: c. 1804 § 2; *PrM* 154 § 2

CROSS REFERENCES: —

COMMENTARY

Kenneth E. Boccafola

This canon makes it clear that the judge has the very important obligation, once the expert's report has been presented, not simply to passively accept its conclusions, but rather to subject it to very serious *evaluation*. Points to be evaluated would be: with regard to method, has the expert scientifically approached his task? Do the conclusions flow logically from the premises? Are the arguments based on facts that have been truly demonstrated as proven? Are they based on full knowledge of all the facts in the case and on the acts? Have all circumstances (apart from those which are only mentioned in the expert's report) been taken into consideration? Has the credibility of the expert been considered? Has he any personal interest in the outcome of the case? Is he using an objective criterion to judge the credibility of the patient or is he operating according to the 'clinical' criterion, which would accept as true all that a suffering and ill patient declares to an assisting physician?[1]

Recently, the Holy Father, while expressing appreciation for the work of psychiatrists and the help that they bring to ecclesiastical tribunals, has also reminded ecclesiastical judges that *they must evaluate the*

1. Z. GROCHOLEWSKI, "Il giudice ecclesiastico di fronte alle perizie neuropsichiatriche e psicologiche: considerazioni sull recente discorso del Santo Padre alla Rota Romana," in *Apollinaris* 60 (1987), pp. 183–203.

anthropological presuppositions of the experts to see whether or not such presuppositions are in accord with a truly Christian anthropology. Such experts might be "chiusi ai valori e significati che trascendono il dato imminente e che permettono all'uomo di orientarsi verso l'amore di Dio e del prossimo come sua ultima vocazione."[2] Therefore one must discern whether or not the expert's conclusions are based on behaviorism or determinism, or perhaps on a merely existential and humanistic view of psychology.

The judge must also consider whether or not the expert understands marriage in the Christian sense as a means of grace, a vocation which includes sacrifice and involves the duty and effort to overcome obstacles. The judge must be aware that there might be a different understanding of the concept of maturity of judgment, which the expert might consider as the final point or culmination of a process of development, but the canonist understands as that minimum necessary to bring about a valid marriage. Our Holy Father describes the dialogue between the judge and the expert in following terms: "Il compito del perito è soltanto quello di prestare gli elementi riguardanti la sua specifica competenza, e cioè la natura ed il grado delle realtà psichiche o psichiatriche, a motivo delle quali è stato accusato il matrimonio. Infatti, il Codice, ai cc. 1578–1579, esige espressamente dal giudice che valuti criticamente le perizie. È importante che in questa valutazione egli non si lasci ingannare né da giudizi superficiali né da espressioni apparentemente neutrali, ma che in realtà contengono delle premesse anthropologiche inaccettabili."[3]

Since the expert is a qualified witness, an advisor who has been asked to proffer a competent well-founded opinion, and not someone to whom decision-making power has been delegated, the judge is not bound either by the observations of the expert or by his conclusions. Nevertheless, because his principal task is to ascertain the truth, a judge would act rashly if he were to dismiss a well reasoned expert's opinion without basing himself on serious reasons. Paragraph § 2 of this canon underlines the judge's obligation to carefully motivate his decision, especially if he should not accept the opinion of the expert.

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2. JOHN PAUL II, *Ad Rotae Romanae Auditores coram admissos die 5 februarii a. 1987*, in *AAS* 79 (1987), p. 1455.
3. Ibid., p. 1458.

1580 Peritis solvenda sunt expensae et honoraria a iudice ex bono et aequo determinanda, servato iure particulari.

Experts are to be paid their expenses and honorariums. These are to be determined by the judge in a proper and equitable manner, with due observance of particular law.

SOURCES: c. 1805

CROSS REFERENCES: c. 1649 § 1,2°

COMMENTARY

Kenneth E. Boccafola

It is the judge who seeks the aid that the expert's knowledge and skill can bring to him to help resolve a judicial controversy. Consequently, the relationship between the tribunal and the expert is a contractual one. The expert has the right to expect that he will be provided with the means necessary to fulfill his task, i.e., access to the party or parties to be evaluated and the necessary information from the acts of the case, and that his expenses will be met and that he will receive a just compensation for his work.

Canon 1649 § 1 provides that the episcopal moderator of the tribunal establish a table of fees for the various services rendered by advocates, experts and interpreters so that the decisions of individual judges in these matters does not become arbitrary.

1581 **§ 1. Partes possunt peritos privatos, a iudice probandos, designare.**

§ 2. Hi, si iudex admittat, possunt acta causae, quatenus opus sit, inspicere, peritiae exsecutioni interesse; semper autem possunt suam relationem exhibere.

§ 1. The parties may designate their experts, to be approved by the judge.

§ 2. If the judge admits them, these experts can inspect the acts of the case, in so far as required for the discharge of their duty, and can be present when the appointed experts fulfil their role. They can always submit their reports.

SOURCES: § 2: c. 1797 § 2

CROSS REFERENCES: c. 1575

COMMENTARY

Kenneth E. Boccafola

This canon, understood in the light of c. 1574 and c. 1575, brings a new element to canonical legislation in that it recognizes the figure of the private expert. Both the *CIC*/1917 (c. 1793) and *Provida Mater* only recognized official experts, i. e. those appointed by decree of the judge.

The present legislation thus establishes two classes of experts:

1. *Official experts*: that is, those officially appointed by decree of the judge. They can consist of:

a) those nominated on the judge's own motion, after having consulted the parties (and also the defender of the bond, etc.) both about the utility or necessity of an expert in general and/or about possible particular individuals to be named;

b) experts nominated after having been proposed by one or both of the parties.

An expert whose report had been prepared extrajudicially and is then accepted as part of the acts of the case according to c. 1575 cannot be considered an *official* expert in the case, since his report might not have been produced according to the criteria established by canonical legislation for an official report. Nevertheless, and especially in cases when the very use of an expert is left to the free decision of the judge, such a report can make

up for a scarcity of proofs and can be admitted into evidence and thus be considered by the judge.

2. *Private experts.* A private expert is one chosen by one of the parties to be his technical consultant during the trial to help him either in his defense or in producing the proofs needed.[1] In order to take part, a private expert would need to be admitted to the trial by the judge, but the other party in the case would not have to be consulted. His purpose would not be to produce an official report but to assure the party that he is assisting that the official expert's report is being properly prepared. The canon recognizes that he has the right to present his own report; it is most likely just such reports that c. 1575 has in mind when it says that unofficial or extrajudicial reports may be accepted by the judge, if he considers it opportune.

Individuals whose names were proposed by the parties for designation as the official expert, and then actually named to that capacity by the judge, are not to be considered "private experts," nor are the doctors who had treated one of the parties in a period before the trial and whose testimony had been required according to c. 1982 of the *CIC*/1917. The latter would be considered simply as ordinary witnesses in the trial.

1. L. DEL AMO, commentary on c. 1581, in *Pamplona Com.*

CAPUT V
De accessu et de recognitione iudiciali

CHAPTER V
Judicial Access and Inspection

1582 **Si ad definitionem causae index opportunum duxerit ad aliquem locum accedere vel aliquam rem inspicere, decreto id praestituat, quo ea quae in accessu praestanda sint, auditis partibus, summatim describat.**

If, in order to decide the case, the judge considers it opportune to visit some place, or inspect some thing, he is to set this out in a decree. After he has heard the parties, the decree is to give a brief description of what is to be made available for this access.

SOURCES: c. 1806; *NSRR* 100 § 1

1583 **Peractae recognitionis instrumentum conficiatur.**

After the inspection has been carried out, a document to this effect is to be drawn up.

SOURCES: c. 1811

CROSS REFERENCES: —

COMMENTARY

Kenneth E. Boccafola

This type of proof is intended to give the judge immediate direct knowledge arising from a personal inspection of some site or location involved in a judicial controversy. In former times this type of proof may

have been more necessary, since nowadays sufficient knowledge can often be gained from photographs, charts or models of the site. The treatment of this material in the present Code is somewhat simplified, since the canons have been reduced from six (*CIC*/1917, cc. 1806–1811) to two.

The new legislation in this matter allows the judge more discretion to decide whether or not to conduct a personal inspection of some particular place because he is no longer required to consider a personal inspection "necessary" (c. 1806 *CIC*/1917), but merely "opportune." Having decided on an inspection, after having heard the parties, he is, in a decree, to summarily indicate what he wishes to do. He should decide the day, time and place for the inspection and cite anyone whom he wishes to be present. During the inspection each of the parties, and any experts invited, should be offered the opportunity to make any comments or arguments they might wish to.

A notary should record who was present, and summarize the comments made or arguments presented. At the end, this summary should be read so that clarifications or corrections may be made; then the summary should be signed by those present. The evaluation of the inspection is left to the judge.

CAPUT VI
De praesumptionibus

CHAPTER VI
Presumptions

1584 **Praesumptio est rei incertae probabilis coniectura; eaque alia est iuris, quae ab ipsa lege statuitur; alia hominis, quae a iudice conicitur.**

A presumption is a probable conjecture about something which is uncertain. Presumptions of law are those stated in the law; human presumptions are those made by a judge.

SOURCES: c. 1825 § 1; *PrM* 170 § 1

CROSS REFERENCES: —

COMMENTARY

Kenneth E. Boccafola

In this chapter the canons deal with another means of proof in canonical trials, i.e. a proof constituted not by the immediate direct demonstration of a particular fact, but rather by a process of reasoning from a proven fact (*indicium*) to a morally certain conclusion. To have probative value, therefore, a presumption must be solidly grounded in some definitely proven fact.

The word *presumption* generally is used in several senses, as:

a) the *subjective conclusion* (grounded, however, in objective reasons) which a lawgiver or judge arrives at about the truth of something, which has not been directly demonstrated in an empirical way, by means of a either an inductive or deductive logical reasoning process, from a given proven fact.

b) the logical *process of reasoning itself* by which the conclusion described above is arrived at.

c) Finally, in a less exact and rather broad sense, presumption can sometimes refer to the proven fact itself, or *indicium*, which provides the basis and starting point for the reasoning process. Thus it is that jurisprudence sometimes refers to the presence of an aversion to marriage as a "presumption" that a person was being forced into the marriage, or to a couple's *de facto* agreement not to have children as a "presumption" that they have not really exchanged with each other the very right to children.[1]

A presumption may be defined, then, as a rational conclusion as to the truth of an uncertain fact, deduced from evidence that, in most cases and almost always, is truly connected with such a fact.

The canon says that a presumption is to be *rational*, and that means both a) that the conclusion reached must be *probable*, because a conclusion deduced by a rational process would necessarily have to have the quality of probability in order to obtain that very assent of reason; and b) that the conclusion is in fact *subject to being reversed by contrary proof* since it is based only on prudential or moral certitude, and not on absolute certitude. As the Regula Iuris put it: *Praesumptio cedit veritati.*

Only two types of presumptions are provided for in the present Code. A presumption of law, or *legal presumption* (*praesumptio iuris*), is a conclusion which the law itself deduces from certain facts (e.g., cc. 15 § 2, 76 § 2, 1060, 1061 § 2, 1096 § 2, 1101 § 1, 1107, 1138 § 2). And thus by law this is considered to be true, unless and until the contrary is demonstrated.

A *judicial* or human presumption (*praesumptio hominis*) is a conjecture, not specifically expressed in any law, but generally supported by the law, by which a judge or any other person would conclude the truth of some fact from the evidence and circumstances connected with such a fact.[2]

Thus the treatment of presumptions in the present Code is rather more simplified than that of the *CIC*/1917 Code. The figure of the *praesumptio iuris et de iure* (a conclusion supported by the law itself and held to be so firm and certain that it was regarded as true, and was unable to be *directly* challenged) has officially been suppressed. Nonetheless, a vestige of such a presumption still remains in the *CIC* in the figure of the *res iudicata* (c. 1642 § 1), in so far as the merit of a *res iudicata*, because it is thus by law presumed true and proper, cannot be directly attacked except by means of a *restitutio in integrum.*

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1. Cf. J.J. GARCÍA FAÍLDE, *Nuevo derecho procesal canónico. Estudio sistemático-analítico comparado* (Salamanca 1984), pp. 152–153.
2. Cf. F. WERNZ, *Jus Decretalium, V: De iudiciis ecclesiasticis* (Prati 1914), p. 494.

A legal presumption is also something quite different from a legal fiction *(fictio iuris)*. A *fictio iuris* is a provision of law which acknowledges (for special reasons of law and equity) certain juridic effects *for a clearly untrue fact.* For example, a legitimated child is recognized as one actually born of a proper marriage or an adopted child is recognized the actual child of its adoptive parents. Presumptions, on the other hand, are conclusions about things that have been until then merely uncertain or not yet proven. Accordingly, a *fictio iuris* can *never* be consonant with the real truth, while a presumption most often is.

1585 Qui habet pro se iuris praesumptionem, liberatur ab onore probandi, quod recidit in partem adversam.

A person with a presumption of law in his or her favour is freed from the onus of proof, which then falls on the other party.

SOURCES: c. 1827

CROSS REFERENCES: cc. 1526 § 2,1°, 1584

COMMENTARY

Kenneth E. Boccafola

The intent of this canon is to indicate the *force* and *efficacy*, as a means of proof, of the types of presumptions.

One who has a *legal presumption* (*praesumptio iuris*, cf. c. 1584) in his favor does not have to prove the controverted fact, for the law itself, by means of a reasoning process and conclusion already enshrined in the law, establishes and demonstrates the point for him. For example, since the internal consent of the mind is presumed to be in agreement with the external expression of consent, a respondent who opposes a declaration of the nullity of his marriage on the basis of c. 1101 does not have to himself prove that the marriage was really entered into with all the proper intentions, this is taken for granted; rather, the petitioner has to demonstrate that at least one of the parties either did not give consent at all, or in some way excluded some essential element of true matrimonial consent.

One must be careful to understand correctly the phrase, *quod recidit in partem adversam.* This does not mean that the other party has the *obligation to prove the fact upon which the presumption is based* (for example that one's intentions really are in conformity with the words one uses to express them), but *rather* that he has the obligation to prove *other facts* in his favor, different from the one legally presumed, which are capable of overcoming the legal presumption.

A *judicial* or human presumption is not as efficacious as a legal presumption; it does not immediately dispense the one in whose favor it is from having to prove his point in the same way a legal presumption does. A judicial or human presumption is simply a morally certain conclusion about the truth of a controverted fact which any prudent person (e.g. a judge) can form for himself from the quality of the evidence presented.

Hence, a *praesumptio hominis* does not always provide full proof in all cases, because it might sometimes be only slightly probable, and thus constitute a mere suspicion rather than a real presumption. If, however, it were seriously probable, then it would constitute semi-full proof, and a judge would be justified in issuing his judicial sentence based on such a presumption, as long as there also existed other cumulative and supporting evidence. If the presumption were really very greatly probable (*praesumptio violenta vel vehemens*), it would thus constitute a complete proof and a judge would be justified in issuing his judicial sentence based solely on this proof.[1]

1. M. LEGA-V. BARTOCETTI, *Commentarius in iudicia ecclesiastica*, II (1939), pp. 820–821.

1586 **Praesumptiones, quae non statuuntur a iure, iudex ne coniciat, nisi ex facto certo et determinato, quod cum eo, de quo controversia est, directe cohaereat.**

The judge is not to make presumptions which are not established by the law, other than on the basis of a certain and determined fact directly connected with the matter in dispute

SOURCES: c. 1828; *PrM* 173

CROSS REFERENCES: c. 1608 § 3, 1584

COMMENTARY

Kenneth E. Boccafola

This canon reminds us once again that a presumption must be grounded in a definitely proven fact which is the starting point for a logical reasoning process. Thus one must first all be sure of the existence of the fundamental fact which is the basis of the presumption, before the legal presumption can be appealed to. For example, before one can cite in one's favor the presumption that one's internal consent is in accord with the words used to express that consent externally, one must first of all prove that there was indeed an external manifestation of consent, i. e. that the marriage was actually celebrated.

The canon also emphasizes that proof by presumptions is simply a supplementary form of proof to be used when the direct proof of the controverted fact does not exist or is insufficient. The fact that the judge is able to deduce and make use of his own judicial presumptions emphasizes once again the principle stated in c. 1608 § 3 that the canon law allows the judge to determine the import and effect of the proofs in the case in accord with his own free and conscientious evaluation.

TITULUS V
De causis incidentibus

TITLE V
Incidental Matters

INTRODUCTION

Piero Antonio Bonnet

Truth, certainty, and justice in incidental matters

Procedural activity is functionally oriented to the decision,[1] in which a judge must make every effort to judge matters in accordance with the facts as they *really* are.[2] A judge must therefore endeavor to arrive at a pronouncement that is in conformance with the *truth*. Only in this way can a judge connect with the divine law, which is the basis of canonical regulation in its entirety, either directly, or indirectly in the form of the provisions set forth by the human legislator, provisions that must be fully grounded in divine law.[3] The purpose of a judge's efforts, which must be exhaustive, is a never-ending search for the truth, since the judicial function finds in the reality of things the order of divine law that must be restored with certainty by the judge's decision.[4]

Thus the *certainty of the law is canonically* based precisely on the truth. In fact, this ineluctible requirement is met in the Church with a set of rules. Although the rules may seem to be inflexible and unbendable in their positive human form, in reality they are always malleable and changeable, but not by capricious arbitrariness—which would hopelessly conflict with any kind of certainty—but because they must live by adapting themselves continuously and perfectly in divine law, which is capable of always being new alongside a changing reality, and at the same time remaining certain of itself and thus capable of conferring this precious certainty to all norms established by man, which it never ceases to

1. Cf. P.A. BONNET, "Sentenza. IV; Sentenze ecclesiastiche," in *Enciclopedia giuridica*, vol. XXVIII (Rome 1992), p. 108.
2. Cf. ST. THOMAS AQUINAS, *S. Th.*, II–II, q. 60, a. 4 ad 2.
3. Cf. D. 9, *dict. p. c.* 11.
4. Cf. ST. THOMAS AQUINAS, *S. Th.*, I, q. 21, a. 2 c.

inform.[5] Further, as has been noted, divine law is truth, since it is inherent in the reality of things and is innate in things (and finds in ecclesial norms of human origin an authorized guide for its most correct individuation). The spirit of canon law, as has been felicitously expressed in an authorized theoretical interpretive essay on the fundamentals of English law, thus prevents "doing violence to the facts with reasoning, since it looks for reason in things and reason is 'the nature of things.'" This same spirit of ecclesial law also imposes the necessity of waiting "until the situation itself develops a decision (or, we might add for the law of the people of God, until the situation itself shows its norm) and turns into it."[6]

Thus, although it is true that the essential requirement of certainty is not lacking in canon law and that it would not be possible for it to be lacking, since "the law is either certain or it is not the law at all,"[7] it is also undeniable that it does have some quite peculiar form.

But the canonical process should not only result in certainty that is truth (since the former is grounded on the latter to the extent of man's possibilities), but in order to attain truth, it must be applied in a procedural fashion that properly expresses charity and justice, and it must *also* be speedy. In fact, "iustitia serotina ... quamdam iniustitiam continet, praesertim in re matrimoniali [and the greater part of ecclesial justice is administered in the area of matrimony], ubi ... sententia etiam favorabilis, si nimis tardet, periculum est ne inutilis evadat."[8] To express this ecclesial requirement properly, a process, in the codes of John Paul II, is not only more flexible, but is also speedier with respect to the Pio-Benedictine Code. In this regard, c. 1453 is a fundamental principle: "Judges and tribunals are to ensure that, within the bounds of justice, all cases are brought to a conclusion as quickly as possible. They are to see to it that in the tribunal of first instance cases are not protracted beyond a year, and in the tribunal of second instance not beyond six months" (cf. the substantially similar provision in c. 1111 *CCEO*). Thus, in this matter, both the strongest and weakest point of the system is the judge, and particularly his sensitivity for balance.

With a process that is certain, since it is a just search for the truth, a dichotomy is resolved that remains unresolved in the majority of national legal systems, where it happens that "justice and certainty, which are

5. Cf. P. A. BONNET "Comunione ecclesiale e diritto," in "Comunione e disciplina ecclesiale. Atti del XXII Congresso dell'Associazione Canonistica Italiana, Aosta, 10–13 settembre 1990," (Vatican City 1991), pp. 49–86, in *Monitor ecclesiasticus* 116 (1991), pp. 49–86; also in P.A. BONNET, *Comunione ecclesiale, Diritto e Potere. Studi di diritto canonico* (Turin 1993), pp. 7–51.

6. G. RADBRUCH, *Der Geist des englischen Rechts* (Göttingen 1958) (Italian translation by A. BARATTA: *Lo spirito del diritto inglese* (Milan 1962), p. 8).

7. N. BOBBIO, "La certezza del diritto è un mito?" in *Rivista internazionale di filosofia del diritto* 28 (1951), p. 150.

8. I. GORDON, "De nimia processuum matrimonialium duratione," in *Periodica* 58 (1969), p. 506.

logically inseparable, end up not only being separated, but placed at odds with each other."[9] Properly conjoining justice and certainty (and thus, in canonical terms, truth), was and is the problem at a key point in a process: a problem that consists of incidental matters and especially their relationship with the primary issue submitted to a judge for consideration.

Having been inspired by a trial that could not be anything other than a certain and just search for the truth, Hostiense, a great canonist of the past, stated this fundamental principle: "Brevius me expedio hanc tradens regulam: quandocumque aliquid opponitur in iudicio propter quod impeditur cognitio principalis negocii, nisi primum pronuncietur super exceptione, tunc super ipsa exceptione primo pronunciabitur cum iudex aliter iurisdictionem suam expedire non posit ... Si vero potest pronunciari super principali et in ipso procedi quamvis interlocutoria non detur super exceptione: sufficit quod de eodem principali pronuncietur."[10] "In Hostiense's 'Regula,' the difference between civil doctrine and canonical doctrine can be seen: while the civil jurists denied the possibility of a separate pronouncement on incidental matters, since they believed the solution was contained 'per quamdam consequentiam' in the decision on the main matter, canonists were inclined toward a separate decision on incidental matters ... because, unlike ... civil jurists, they believed that it was the decision on" incidental matters "that determines 'per quamdam consequentiam' on the decision of the main matter. Up to this point, it is clear that ... whereas an interlocutory sentence was admissible for civil jurists only in exceptional cases or counterclaims petitions, for canonists an interlocutory sentence that 'vim definitivae' has a far greater scope, application and function, insofar as it is not the same as a sentence ruling on the main matter, it does settle a matter linked to the main matter, according to Hostiense's 'regula.'"[11]

This spirit of the canonical process substantially informs the general discipline for incidental matters in cc. 1587–1591 (and by analogy, cc. 1267–1271 *CCEO*).

In particular (see commentary on c. 1590), this spirit is reflected in the fundamental provision on the limits of the separate unappealability of decisions by a judge who decides an incidental matter. It concerns a prescription contained in c. 1629, 4° (and also substantially c. 1310, 4° *CCEO*), which echoes c. 1880, 6° *CIC*/1917: "No appeal is possible against: ... 4° a decree of the judge or an interlocutory judgment, unless the appeal is lodged together with an appeal against the definitive judgment." However,

9. F. CARNELUTTI, "La certezza del diritto," appendix to F. LÓPEZ DE OÑATE, *La certezza del diritto* (G. ASTUTI Ed.) (Milan 1968), p. 203.
10. HOSTIENSE, *Summa, De ordine cognitionum*, f. 84 v (Lugduni 1537).
11. P. FEDELE, "Le questioni incidentali nella storia del processo canonico," in *Cause incidentali e processo contenzioso sommario ossia orale nella dinamica della revisione del diritto processuale canonico* (Rome 1988), pp. 20–21.

the definitive or final nature of the decree and interlocutory judgment is not described the same way in *CIC*/1917 or John Paul II's procedural legislation. In the former case, the uncertainties arising from the principle set forth in c. 1880, 6° were resolved by adopting a Tridentine principle[12] in article 214 § 2 of the applauded Instruction *Provida Mater Ecclesia,* of August 15, 1936, which, while still not excessively affecting the celerity of a process, and thus its justice, was more concerned for the truth: "Sententia vel decretum tunc censetur habere vim definitivae cum gravamen inferent, quod non potest per definitivam sententiam reparari: ut puta si probationes quae in iudicium ferendum vere influere possunt, sententiam vel decretum admittere recusent." The current c. 1618 (and c. 1301 *CCEO* also) sanctions a norm that, without sacrificing a search for the truth too much, is more concerned, in a certain way, with safeguarding the speediness of process and therefore justice[13]: "An interlocutory judgment or a decree has the force of a definitive judgment if, in respect of at least one of the parties, if [*sic*] prevents the trial or brings to an end the trial itself or any instance of it."

In conclusion, also by means of the discipline for a procedural moment of fundamental importance, as are incidental matters, it is shown that a canonical trial expresses a just search for the truth capable of guaranteeing every member of the faithful a peculiar and sure certainty, even when the very delicate point of equilibrium incorporated in an ecclesial norm may undergo variations diachronically (and perhaps even synchronically among the various local churches[14]). These variations must always be within a quite narrow range, and in any case a norm must express an interpretation according to the justice of the intent, conceded to the faithful, to attain the truth. In fact, truth and justice, if in a process they represent, respectively, the object (and therefore the merits of the case) and the procedural *iter*, are in reality in perfect correlation with each other, since the truth that is found in things (divine law) cannot help but express "ordo iustitiae et caritatis," from the moment when it is nothing less than the incarnation of God's eternal design for the universe in general and humankind in particular.

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12. Cf. "Sess. XIII (11.X.1551), Decretum super reformationem can. I," in G. ALBERIGO-G.L. DOSSETTI-P.P. JOANNOU-C. LEONARDI-P. PRODI, *Conciliorum oecumenicorum decreta* (Bologna 1991), p. 699.

13. Cf. S. VILLEGGIANTE, "Le questioni incidentali," in P.A. BONNET-C. GULLO (Eds.), *Il processo matrimoniale canonico*, 2nd ed. (Vatican City 1994), pp. 659–661.

14. For this terminology, cf. P.A. BONNET, "Pluralismo (in genere), a): diritto canonico," in *Enciclopedia del diritto*, vol. XXXIII (Milan 1983), pp. 959–961. Cf. also H. DE LUBAC, *Pluralismo di Chiese o unità della Chiesa? (Les Églises particulières dans l'Église universelle, suivi de la maternité de l'Église)* (Paris 1971), Italian trans. by G. STELLA (Brescia 1973), pp. 27–38.

1587 **Causa incidens habetur, quoties, incepto per citationem iudicio, quaestio proponitur quae, tametsi libello, quo lis introducitur, non contineatur expresse, nihilominus ita ad causam pertinet ut resolvi plerumque debeat ante quaestionem principalem.**

An incidental matter arises when, after the case has begun by the summons, a question is proposed which, even though not expressly raised in the petition which introduced the case, yet so affects the case that it needs to be settled before the principal question.

SOURCES: c. 1837; *PrM* 187

CROSS REFERENCES: —

COMMENTARY

Piero Antonio Bonnet

Incidental matters: concept and structure

The general discipline for incidental matters is contained in cc. 1587–1591 (cf. cc. 1267–1271 *CCEO*).[1] A discipline of this type is not applicable only within the limits permitted under the different provisions set forth in the norms in order to deal with some of the controversies therein (which are generally quite fragmentary), but also according to a traditional hermeneutic canon that is sanctioned as no. 24 of the *regulae iuris* given in the appendix to *Liber VI*: "Generi per speciem derogatur." In particular, insofar as marriage nullities are concerned—they comprise the largest group of cases decided by ecclesiastical tribunals—it must be taken into account that the application of these norms under c. 1691 (cf., with certain variants, c. 1736 *CCEO*) is possible "nisi natura rei obstet" and apart from the special norms established for "de statu personarum" cases (a totally obvious condition implicit in the foregoing norm, but in fact omitted in *CCEO*) and to safeguard the public good.[2]

The procedural discipline set forth for incidental matters was certainly formulated to promote the search for the truth. Only in this way can the law devise a process[3] aimed at carrying out divine law, on which the

1. Cf. S. VILLEGGIANTE, "Le questioni incidentali," in P.A. BONNET-C. GULLO (Eds.), *Il processo matrimoniale canonico*, 2nd ed. (Vatican City 1994), pp. 635–637.
2. Regarding the particular significance of this category in the canonical process, cf. P.A. BONNET, "Processo, XIII; Processo canonico: profili generali," in *Enciclopedia giuridica*, XXIV (Rome 1991), p. 16 (of the entry).
3. Cf. ibid.

entire ecclesial order is based, either directly, or indirectly through the human norm, which must necessarily derive its truth from the same divine law.[4] The purpose[5] of the complex activity that is carried out in this process can therefore be nothing other than an exhaustive search for the truth, since jurisdictional activity, in order to be able to devise an order in harmony with divine wisdom, should be capable of attaining and affirming the truth.[6] The norms for incidental matters are also part of the fundamental, linear, and at the same time complex, design of the canonical codifier.[7]

On the other hand, we have to learn how to harmonize the search for the truth while safeguarding justice, which would be greatly harmed if the parties had a pointlessly slow and tedious trial, which had gradually come to be the case in practice under the *CIC*/1917. In reality, in the context of marriage causes, it was said: "Consensus adeo unanimis et universalis circa excessivam causarum matrimonialium durationem, non solum facti veritatem, sed etiam magnitudinem ostendit; quod, propter secumferens animarum detrimentum et contra tribunalia ecclesiastica suspiciones, tantum est ut eidem remedium efficax diligentissime apponi debeat.[8]" Indeed, the situation had become so exceptionally grave that concerned bishops brought it up at the Second Vatican Council. The Council Fathers, in requesting a new discipline for marriage cases, which are such a large part of the Church's judicial practice, expressed their desire that "expeditior habeatur cursus causarum matrimonialium et, ad abusus praecavendos, disciplina processus matrimonialis congruis munimentis fulciatur."[9] As a matter of fact, delayed justice is unquestionably contrary to the "spiritus caritatis et mansuetudinis Christi, qui," as the Council Fathers themselves stressed once again, "semper aurea et perennis regula Ecclesiae est, et leges iudiciaque ecclesiastica informare debet."[10]

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4. Cf. P.A. BONNET, "'Continuità' e 'discontinuità' nel diritto ecclesiale e nell'esperienza giuridica totale dell'uomo," in G. BARBERINI (Ed.), *Raccolta di scritti in onore di Pio Fedele*, I (Perugia 1984), pp. 31–54, and above all, "Comunione ecclesiale e diritto," in "Comunione e disciplina ecclesiale. Atti del XXII Congresso dell'associazione Canonistica Italiana, Aosta, 10–13 settembre 1990," (Vatican City 1991), pp. 49–86, in *Monitor ecclesiasticus*, 116 (1991), pp. 49–86; also in P.A. BONNET, *Comunione ecclesiale, Diritto e Potere. Studi di diritto canonico* (Turin 1993), pp. 7–51.

5. Cf. PIUS XII, *Allocutio ad Praelatos Auditores ceterosque Officiales et Administros Tribunalis Sacrae Romanae Rotae necnon eiusdem Tribunalis Advocatos et Procuratores*, October 2, 1944, in *AAS* 36 (1944), pp. 281–290; JOHN PAUL II, *Allocutio ad Tribunalis Sacrae Romanae Rotae Decanum, Praelatos Auditores, Officiales et Advocatos, novo litibus iudicandis ineunte anno*, February 4, 1980, in *AAS* 72 (1980), pp. 172–178.

6. Cf. ST. THOMAS AQUINAS, *S. Th.*, I, q. 21, a. 2 c.

7. Cf. S. VILLEGGIANTE, "Le questioni incidentali," cit., pp. 637–638.

8. I. GORDON, "De nimia processuum matrimonialium duratione," in *Periodica* 58 (1969), pp. 492–493.

9. *Votum de matrimonii sacramento*, no. 7, in *Acta Synodalia S. Concilii Oecumenici Vaticani II*, III, pars VIII (Rome 1976), p. 471.

10. Ibid. Cf. P.A. BONNET, "Carità e diritto: la dimensione comunitaria quale momento della struttura interna del diritto della Chiesa," in *Investigationes theologico-canonicae* (Rome 1978), pp. 75–98; idem, "Eucharistia et ius," in *Periodica* 66 (1977), pp. 583–616.

Also for this reason, the norm we are commenting on here strives to devise a procedure for incidental matters that would in practice prevent diversions of any kind, especially the trend toward delays and obstructionism,[11] which in itself would seriously harm justice. To this end,[12] this discipline, on one hand, has been placed *in manu iudicis* by ensuring broad discretionary powers. On the other hand, a certain restraint has been provided in the particular area of the separate impugning of decisions, although endeavoring not to attenuate too much the need to search for the truth and not allow the parties' right to a defense[13] to harm other essential requirements of justice. In this way, it has been possible to mesh rather harmoniously the requirements of justice with those for the search for the truth.

The canon we are commenting on here (cf. also c. 1267 *CCEO*) presents the concept of an incidental matter in a way that is not substantially different from that which appeared in c. 1837 *CIC*/1917 (cf. also *PrM* 187 and *SN* 361). It is about a concept that is consolidated in the norms, which mediately expresses a precise relationship with the primary matter under discussion, and at the same time a well-defined procedural autonomy and a certain position in the temporal evolution of the process.[14]

Thus, above all else, an incidental matter is an issue that must necessarily be related to the litigation initially brought to the ministry of a judge, which will assume the position of the principal matter with respect to it. This relationship between the two matters can only consist of the clarification of an arguable and contested point which is indispensable in order to resolve the central matter or to continue the judicial procedure of the principal matter. It is an incident that arises in the course of a trial and requires elucidation that removes the obstacle of a substantial or procedural doubt, in order to arrive at the truth of the principal matter.

On the other hand, an incident is a matter that, although it may not be expressly mentioned in writing in the introduction of the principal matter, must be resolved *before* the principal matter because of the causal link between the two matters. Thus, what we call an incidental matter is a true cause in and of itself[15] and therefore also has an autonomy of its own with respect to the principal matter. This autonomy is frequently reflected in a

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11. Cf. C. GULLO, "Ostruzionismo processuale e diritto di difesa," in K. LÜDICKE-H. MUSSINGHOFF-H. SCHWENDENWEIN (Eds.), *Iustus iudex. Festgabe für Paul Wesemann zum 75. Geburtstag von seinen Freunden und Schülern* (Lüdinghausen 1990), pp. 495–506.

12. Cf. S. VILLEGGIANTE, "Le questioni incidentali," cit., pp. 637–638; S. BERLINGÒ, "Il processo," in E. VITALI-S. BERLINGÒ, *Dirito matrimoniale canonico* (Milan 1989), pp. 250–251.

13. Cf. P.A. BONNET, "Processo...," cit., pp. 6–11 (of the entry).

14. Cf. J.J. GARCÍA FAÍLDE, *Nuevo derecho procesal canónico (estudio sistemático-analítico comparado)*, 2nd ed. (Salamanca 1992), pp. 188–189; S. VILLEGGIANTE, "Le questioni incidentali," cit., pp. 642–643.

15. Cf. S. BERLINGÒ, "Il processo...," cit., p. 248.

procedural course of its own and always in a specific decision that is thus different from the decision resolving the principal matter.

Incidental matters, then, have a well-defined procedural timing, since they can only arise after a case has begun (i.e., subsequent to the citation), as the canon itself states (cf. also c. 1264 *CCEO*), and in accordance with the general provision set forth in c. 1512, 5° (cf. c. 1194, 5° *CCEO*). The inconsistency between *CIC*/1917,[16] in which cc. 1725, 5° and 1837 laid down a norm that is identical to the current norm, and at the same time in c. 1732 provided "instantiae initium fit litis contestatione," has thus been resolved. Further, the idiosyncrasy of *CIC*/1917 had been already resolved by cc. 247, 5°, 254 and 361 *SN*, which substantially anticipated the discipline of *CIC*.

Therefore, we cannot include in these cases properly speaking matters arising *in limine litis* that are called *preliminary*[17] or also those that are called *pre-judicial matters*[18] that precede the actual trial properly speaking. However, while matters arising from the rejection of the *libellus*[19] (cf. c. 1505 § 4 and c. 1188 § 4 *CCEO*) cannot arise during the time frame set forth for incidental matters, there are a number of other matters that, depending on the case, may arise within the time frame required of incidental matters (i.e., "incepto per citationem iudicio"). For example, the latter includes matters related to a judge's competence,[20] which would be essential to resolve prior to continuing with the priniple issue..

The first assumption would be cases of *absolute incompetence*. This type of incompetence must be declared by the judge, including being carried out ex officio under c. 1459 (cf. c. 1118 *CCEO*) prior to the principal judgment and at any phase or stage of the case by virtue of c. 1461 (cf. c. 1120 *CCEO*). A decision in favor of competence—provided it is in accordance with the norms specifically set forth for these matters—may be appealed pursuant to an *a contrario* argument based on c. 1460 § 2 (cf. c. 1119 *CCEO*), since the harm that could arise from prosecuting a case that might end in a judgment that is irremediably null and void under cc. 1620, 1° and 1621 (cf. c. 1303 § 1, 1° and § 2 *CCEO*) is also evident.

A second assumption to which we refer would be in situations in which incompetence would be *relative*. In these cases, according to the special discipline provided for this purpose under c. 1459 § 2 (cf. c. 1118 § 2 *CCEO*), unless the matter arises subsequently, the issue of incompe-

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16. Cf. I. GORDON, *Novus processus nullitatis matrimonii. Iter cum adnotationibus* (Rome, 1983), note (i), p. 19.
17. Cf. J.J. GARCÍA FAÍLDE, *Nuevo derecho procesal...*, cit., pp. 188–189; S. VILLEGGIANTE, "Le questioni incidentali," cit., pp. 638–639; S. BERLINGÒ, "Il processo...," cit., pp. 241–243 and 248.
18. Cf. I. GORDON, *Novus Processus...*, cit., note 1, p. 55.
19. Cf. S. VILLEGGIANTE, "Le questioni incidentali," cit., pp. 638–642.
20. Cf. I. GORDON, *Novus processus...*, cit., p. 57.

tence must be raised prior to the joinder *only* before the judge himself, whose decision—which should be handed down as soon as possible—if negative, is also unappealable. But in these latter cases, the possibility exists of bringing, in the ways and for the reasons for impugning, a complaint of nullity or *restitutio in integrum* under c. 1460 § 2 (cf. c. 1119 § 2 *CCEO*, which adds a third-party opposition, which, in our opinion, was wisely retained and is regulated by cc. 1330–1333 *CCEO*).

As an exception, both absolute and relative incompetence must be petitioned before the same judge hearing the principal matter in accordance with c. 1460 (cf. c. 1119 § 1 *CCEO*). An affirmative decision—we have already spoken of a negative decision—that is, a decision in favor of incompetence can be appealed under c. 1460 § 3 (cf. c. 1119 § 3 *CCEO*) within fifteen useful days (cf. cc. 201, 203; cf. also cc. 1544 § 2 and 1546 *CCEO*) before the appeals tribunal, because of the evident danger of *denegatio iustitiae* (c. 1547 § 1; cf. c. 1115 § 1 *CCEO*) and in accordance with the principles that may be deduced from c. 1618 with respect to c. 1629, 4° (cf. cc. 1301 and 1310, 4° *CCEO*).

On the other hand, to continue with the procedural time set forth for these matters, there is no lack of cases that, if petitioned, could only be incidental matters. This would be the case with respect to evidentiary proofs,[21] such as, for example, matters related to excluding witnesses[22] as well as experts,[23] as referenced under c. 1576 (cf. c. 1257 *CCEO*). In fact, the norm, which grants broad discretionary powers to the judge who is competent to determine whether the cause of exclusion is truly a just one, has been worded quite broadly, such that, unlike c. 1764 § 3 *CIC*/1917, it is capable of covering any situation, not just situations related to witness lists submitted by others, but also by a party.[24] Further, it provides—also in an innovative way with respect to cc. 1782–1786 *CIC*/1917—that a petition for exclusion can be filed any time "ante testis excussionem" (c. 1555 *CIC*; cf. c. 1236 *CCEO*).

Matters related to the admissibility of proofs are also incidental matters.[25] Certainly, these are matters that are highly relevant to the principal matter, but which cannot be confused with it by virtue of their own specific and quite distinct object: precisely the admissibility of proof itself.[26]

21. Cf. P.A. BONNET, "Prova in generale, d) diritto canonico," in *Enciclopedia del diritto*, XXXVII (Milan 1988), pp. 679–696.

22. Regarding that type of proof, cf. P.A. BONNET, "Testimoni e testimonianza (diritto canonico)," in *Enciclopedia del diritto*, XLIV (Milan 1992), pp. 518–525.

23. Cf. P.A. BONNET, "Il giudice e la perizia," in P.A. BONNET-C. GULLO (Eds.), *L'immaturità psico-affettiva nella giurisprudenza della Rota Romana* (Vatican City 1990), pp. 57–93. Cf. also, idem, "Nel segno dell'uomo: diritto e scienza nell'economia del matrimonio canonico," in *Quaderni Studio rotale*, 3/5 (1990), pp. 5–34.

24. Cf. J.J. GARCÍA FAÍLDE, *Nuevo derecho procesal...*, cit., pp. 144–145.

25. Cf. S. VILLEGGIANTE, "Le questioni incidentali," cit., pp. 651–656.

26. Cf. in a different sense, S. BERLINGÒ, "Il processo...," cit., p. 248.

More particularly, c. 1527 § 2 (cf. c. 1208 § 2 *CCEO*) provides that a party may pursue a petition against a decision under which a judge excludes a proof requested by said party. In this case, the same judge is competent (*ipse iudex*), and if the principal matter is not heard by a sole judge, the college[27] is the proper competent judge in this case. In this regard c. 1085 § 1 *CCEO* provides that the tribunal is to proceed collegially and arrive at a decision by majority vote—under penalty of invalidity of the decision—when ruling on a denial of recourse against a decree of the presiding judge. The same judge must decide the incidental matter *expeditissime*, and therefore, in accordance with c. 1629, 5° (cf. c. 1310, 5° *CCEO*), it is unappealable.[28]

In this case, analogously invoking c. 1505 § 4 (cf. c. 1188 *CCEO*) does not avail to allege the appealability of a judge's negative decision. Under that canon, it is admissible to bring recourse against a *reiectio libelli* in the appeal tribunal.[29] In the case covered by that norm, the judicial decision applies to denying a libellus initiating a case, whereas in the case we are discussing here, the decision has to do with hearing an incidental matter, if—and this is precisely what the judge must confirm—the conditions legally required to hear a controversy of this nature exist. On the other hand, neither does it seem convincing to allege under c. 1589 § 1 (cf. c. 1269 § 1 *CCEO*) that the judge "in marriage cases is not the instructing judge, but the college, therefore against the instructing judge is admissible before the college." So there is no reason to say "there should not be recourse in the appeal tribunal against the decision of a college called upon to decide for the first time an incidental matter related to the inadmissibility of proofs."[30] In fact, the instructing judge's decision is not the decision of the judge that is competent to hear the principal matter related to the incidental matter affecting it, so a pronouncement by the college (*idem iudex*) seems to be an irrevocable guarantee, and all the more so if this decision does not entail the intervention of another judge. The canonical legislator, by means of the *expeditissime*, has indicated that he does not consider such intervention necessary, at least in this case, to guarantee the search for the truth.

However, matters that could be handled separately but are related to the principal matter conditionally, even though they may not always seem to formally be incidental matters can be treated formally as incidental matters. This situation arises because at the time they are presented to the judge, these matters are quite difficult to distinguish substantially from incidental matters since[31] the applicable norms are the same, except in

27. Cf. S. VILLEGGIANTE, "Le questioni incidentali," cit., p. 654; S. BERLINGÒ "Il processo…," cit., p. 248.
28. Cf. S. BERLINGÒ, "Il processo…," cit., p. 248.
29. Cf. S. VILLEGGIANTE, "Le questioni incidentali," cit., p. 655.
30. S. VILLEGGIANTE, "Le questioni incidentali," cit., p. 655.
31. Cf. J.J. GARCÍA FAÍLDE, *Nuevo derecho procesal…*, cit., pp. 188–189.

certain points that may eventually be regulated in a special way, and also, as has already been noted, these are matters that have arisen after the respondent has been summoned.

Purely directive decrees[32] mentioned in c. 1617 (cf. c. 1300 *CCEO*), which are often frequent when the tribunal is collegial, may not give rise to incidental matters. These decrees are issued by the instructing judge *ad ordinandum processum*and *nullam supponunt disputationem*[33]; therefore, they do not constitute real and effective exceptions to this completely logical, natural principle. They may originate legitimately under the appearance of directive decrees in which a decision is hidden that may affect the main question (the determination of the truth at issue or that which affects procedural guarantees and therefore justice) set forth to safeguard that very search for the truth involved in the principal matter; for example, if a judge shortened judicially or conventionally stipulated time limits in which to complete a given procedural act without the consent of the parties, pursuant to c. 1465 §§ 1–2 (cf. c. 1124 §§ 1–2 *CCEO*).

The *CIC* norms, designed for safeguarding justice and truth, the great principles characterizing the entire canonical procedure, have laid down a process structure with two very distinct phases:[34] the first phase is oriented toward determining the admissibility of the interlocutory matter (cf. cc. 1588–1589) and may be divided into two stages if the tribunal hearing the principal matter is collegial, from the time when the interim decision by the instructing judge may follow that of the college; the second phase, which may or may not arise, is the consideration of and decision on an incidental matter properly speaking (c. 1590).

32. Cf. S. VILLEGGIANTE, "Le questioni incidentali," cit., pp. 643–644.

33. F. ROBERTI, *De processibus*, I, *De actione, de praesuppositis processus et sententia de merito*, 4th ed. (Vatican City 1956), p. 492.

34. Cf. S. VILLEGGIANTE, "Le questioni incidentali," cit., pp. 261–262; S. BERLINGÒ, "Il processo...," cit., p. 249.

1588 **Causa incidens proponitur scripto vel ore, indicato nexu qui intercedit inter ipsam et causam principalem, coram iudice competenti ad causam principalem definiendam.**

An incidental matter is proposed before the judge who is competent to decide the principal case. It is raised in writing or orally, indicating the connection between it and the principal case.

SOURCES: c. 1838; *NSRR* 106

1589 **§ 1. Iudex, recepta petitione et auditis partibus, expeditissime decernat utrum proposita incidens quaestio fundamentum habere videatur et nexum cum principali iudicio, an vero sit in limine reicienda; et, si eam admittat, utrum talis sit gravitatis, ut solvi debeat per sententiam interlocutoriam vel per decretum.**

§ 2. Si vero iudicet quaestionem incidentem non esse resolvendam ante sententiam definitivam, decernat ut eiusdem ratio habeatur, cum causa principalis definietur.

§ 1. When the judge has received the petition and heard the parties, he is to decide with maximum expedition whether the proposed incidental matter has a foundation and a connection with the principal matter, or whether it is to be rejected from the outset. If he admits it, he must decide whether it is of such gravity that it needs to be determined by an interlocutory judgement or by a decree.

§ 2. If, however, he concludes that the incidental matter is not to be decided before the definitive judgement, he is to determine that account be taken of it when the principal matter is decided.

SOURCES: § 1: cc. 1839, 1840 § 1; *NSRR* 109 § 1, 110; *PrM* 189 § 1, 190 § 1
§ 2: *NSRR* 109 § 1; *PrM* 189 § 2

CROSS REFERENCES: —

COMMENTARY

Piero Antonio Bonnet

Admission of incidental cases

As was explicitly provided in *CIC*/1917[1] and as must be admitted in *CIC* (and also in *CCEO*) by virtue of the internal logic of the system, incidental matters may also be raised by private or public parties (the defender of the bond and the promoter of justice),[2] if the latter are present in the trial. Further, the judge may also take this initiative. He may introduce incidental matters ex officio by virtue of a power that is invested in him in a special way in certain cases (e.g., absolute incompetence as regulated under c. 1461 or c. 1120 *CCEO*) or in a general way, as provided under and within the limits of c. 1452 § 2 (cf., with certain variations, c. 1110 § 2 *CCEO*).[3]

Under c. 1588 (cf. c. 1268 *CCEO*), the parties may introduce these matters verbally or in writing before the judge that is competent to hear the principal matter by showing the relationship between the incidental matter and the principal matter. In the case of verbal petitions, the analogous applicability of c. 1503 § 2 (cf. c. 1186 *CCEO*) should be assumed. This canon requires that a judge who has legitimately admitted a verbal presentation of a petition introducing a case have a notary write down and read the petition to the petitioning party, who must approve it. An instrument is thus created for all rightful purposes to serve as a written petition that was originally omitted.[4] This procedural situation is therefore fully in line with the predominant written character that is reviewed in a canonical process, in spite of efforts made in the new code to free it, at least in some ways, from the typology. This character, while having the advantage of guaranteeing the search for the truth, also has the disadvantage of slowing the timing of the process.[5]

Once a petition has been received, the judge, in accordance with c. 1589 § 1 (cf. c. 1269 § 1 *CCEO*), must hear both parties, including public parties, pursuant to c. 1434, 1° (cf. c. 1098, 1° *CCEO*). However, the promoter of justice and the defender of the bond must be heard only if present at the trial.[6] This is expressly stated in c. 1434. Further, the norm

1. Cf. c. 1837 *CIC*/1917; cf. also *PrM* 187.
2. Cf. also c. 1434,2° (c. 1098,2° *CCEO*). Regarding that qualification, cf. P.A. BONNET, "Processo, XIII; Processo canonico: profili generali," in *Enciclopedia giuridica*, XXIV (Rome 1991), pp. 11–12 (of the entry).
3. Cf. J.J. GARCÍA FAÍLDE, *Nuevo derecho procesal canónico (estudio sistemático-analítico comparado)*, 2nd ed. (Salamanca 1992), p. 189.
4. Cf. ibid.
5. Cf. P.A. BONNET, "Processo...," cit., pp. 17–18.
6. Cf. J.J. GARCÍA FAÍLDE, *Nuevo derecho procesal...*, cit., p. 191.

given in *PrM* 190 § 2, which required for marriage processes the intervention of the promoter of justice, even if absent from the trial, "si constiterit bonum publicum in discrimen vocari," has been changed in the *CIC*. It is now left to the judge's discretion as to whether the promoter of justice should be summoned "si quaestionis incidentalis natura vel difficultas id consulat."

Thus, the judge must issue a decree according to c. 1589 § 1 (cf. c. 1269 § 1 *CCEO*) ruling on the admissibility of an incidental matter, and more particularly on its grounding ("utrum proposita incidens quaestio fundamentum habere videatur") and its relationship with the principal matter. If the judge is morally certain[7] that the matter raised incidentally does not have *fumus boni iuris* (i.e., that it lacks all grounding and any consistency in law or in fact) or does not have the necessary relationship with the principal matter and does not substantively or procedurally affect it, the judge must deny the petition. Otherwise, the judge must admit it. In this first phase, the judge, while considering the problem as it appears at first glance and reviewing it in a superficial manner without going into the essence of it, *cannot and must not delve into the merits* of any incidental matter that arises.[8] In reality, the purpose of this first procedural phase and of this first decision is basically to prevent an irrevocable instrument of guarantees of the search for the truth, such as an incidental matter, from gravely harming justice if it is used with an obstructionist intent to delay the development of the principal matter.[9]

If the judge hands down an affirmative decision, under c. 1589 § 1 (cf. c. 1269 § 1 *CCEO*), he must also determine whether the matter is of sufficient importance to require a decision in the form of an interlocutory judgment or whether a simple decree suffices. Further, this is a formal distinction (cf. in any case c. 1613 and c. 1296 *CCEO*) that does not have great procedural relevance because of the substantial equivalence of these two types of decisions.[10] In either case, the canon provides the safeguard of contradictory action.[11]

In this first phase, in addition to the alternative in the form of a negative or affirmative decision insofar as an incidental matter is concerned, the judge also has a third option: under c. 1589 § 2 (cf. c. 1269 § 2 *CCEO*), if a judge finds that he cannot resolve an incidental matter before handing

7. Cf. P.A. BONNET, "De iudicis sententia ac de certitudine morali," in *Periodica* 75 (1986), pp. 61–100.

8. Cf. S. VILLEGGIANTE, "Le questioni incidentali," in P.A. BONNET-C. GULLO (Eds.), *Il processo matrimoniale canonico*, 2nd ed. (Vatican City 1994), pp. 650–651.

9. Cf. M. LEGA-V. BARTOCCETTI, *Commentarius in iudicia ecclesiastica, iuxta codicem iuris canonici*, II (Rome 1950), p. 856.

10. Cf. cc. 1589 §1, 1591, 1607, 1618, 1629,4°–5°; cf. cc. 1269 §1, 1271, 1290, 1301,4°–5° *CCEO*.

11. Cf. S. VILLEGGIANTE, "Le questioni incidentali," cit., p. 650.

down a final decision on the principal matter, he may postpone it until the principal matter is decided.[12]

This is a new provision that was not in *CIC*/1917 or *SN* 363. However, a precedent may be pointed out in article 109 § 1 *NSRR* (1934): "Turnus ... statuit de ea (petitione circa quaestionem incidentem) habendam rationem una cum causa principali"; and especially *PrM* 182 § 2: "Collegium ... si iudicet eam necessario non esse resolvendam ante sententiam definitivam, decernat, ut de ea habeatur ratio die propositionis causae." It may also be noted that § 95 no. 3 of *Regulae servandae in iudiciis apud S. R. Rotae Tribunal* of August 4, 1910 already contained a prescription to postpone a decision on the principal matter until the final decision, although in a special sense limited to the revocation of a decision already handed down on an incidental matter: "Reiectio (revocationis) est simplex et fit per rescriptum *in decisis*. Admissio autem revocationis niti debet potissimum super novis deductionibus; et hae rationes breviter exponi debent in sententia revocationis. Quum autem responsio circa petitionem revocationis ad definitivam sententiam remittitur, fit per consuetum rescriptum:—*habebitur ratio in die propositionis causae super merito.*"[13]

It has been authoritatively observed that the provision we are speaking of "seems to be ... *a refuge* to which judges retreated when besieged by continual petitions on incidental matters to take cover from foreseeable appeals of their interlocutory decisions," in the manner of "upon careful consideration, given the elusive and openly defensive finality of these decisions," it would be far better if "judges did not feel forced to flee from an open field and protect themselves with a such an instrument.[14]" However, in spite of reservations that might be noted, this means offered to judges under current legislation—if the right conditions exist—may be capable of putting the principle of procedural economy into practice. It is of the greatest importance to ensure the speediness of a trial, without which it could not be called just. From this point of view, c. 1589 § 2 (cf. 1269 § 2 *CCEO*) is consistent with the structure of the process that the current legislator wanted to achieve: to be well balanced in the duration of proceedings, notwithstanding the unfailing requirement necessitated by the search for truth. However, the strong point, and at the same time the weak point, of the canonical procedural system is the judge, particularly because of his sense of balance, who cannot substitute for the shortage of personnel or inadequate juridical, technical and professional training.

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12. Cf. ibid., pp. 275–277.
13. P. GASPARRI-I. SEREDI, *Codicis iuris canonici fontes*, VIII (Vatican City 1938), no. 6461, p. 563.
14. A. SABATTANI, "Le impugnative delle decisioni incidentali," in *Cause incidentali e processo contenzioso sommario ossia orale nella dinamica della revisione del diritto processuale canonico* (Rome 1988), pp. 99 and 100.

The judge's decision on incidental matters is necessary to complete the first procedural phase.[15] In fact, unless it is the judge himself who raised the matter,[16] there is a petition by a legitimate party to which a judge must reply. Since a petition by one of the parties asking a judge to decide an incidental matter must rightfully be admitted in judicial arguments as a just search for the truth, the lack of a reply assumes the form of a *denegatio iustitiae* pursuant to c. 1457 § 1 (cf. c. 1115 § 1 *CCEO*), which is not only grounds for the sanctions provided by this norm, but also for compensation for harm to either party, pursuant to c. 128 (cf. c. 935 *CCEO*).

The legislator was concerned in general about a situation in which the Church's tribunals would be in conflict with their function as operators and servants of truth and justice. It is true that there is no current norm like *PrM* 188 § 1, which provided for marriage cases that "Parti legitime instanti instructor satis facere tenetur per decretum." However, the current norms also contrast with the substantial inefficiency of the system described under c. 1710 *CIC*/1917, which provided that if a judge did not reply to the petition contained in the libellus within one month, the petitioner could petition the judge "ut ... suo munere fungatur," and if five more days elapsed without a reply to this notice of a delay, the party could appeal to the ordinary if he was not the judge, or to the superior tribunal to order the judge to decide or else replace the judge. In fact, the current c. 1506 (as did c. 1189 *CCEO*) provides that after one month has elapsed since the petition was filed, the filing party should petition the judge to fulfill his duty, and if ten more days elapse after said reminder with no response, the petition initiating the case is to be considered admitted. This mechanism for automatically admitting a party's petition, which is useful to prevent the risk of a negative procedural situation arising from a judge's negligence, was introduced by the Code Commission "sive quia iura partis ita salvantur, sive quia generatim reiectio libelli rarissime fit et ideo admissio ex iure non est incongrua."[17]

It may also be pointed out that this first phase having to do with any incidental matters that arise may develop—not without being reflected by the conclusion—in two stages,[18] provided that the judge who is competent to decide the principal matter is collegial. In fact, a collegiate tribunal, in order to proceed with the investigative phase efficiently, may appoint an auditor according to c. 1428 § 1 (cf. c. 1093 § 1 *CCEO*), remembering that c. 1677 § 4 (cf. c. 1363 § 4 *CCEO*) provides that in marriage nullity cases, one member of the college (either the presiding judge or the ponens) is responsible for conducting the investigation of the case alone. In this case,

15. Cf. S. VILLEGGIANTE, "Le questioni incidentali," cit., pp. 651–652.
16. Cf. J.J. GARCÍA FAÍLDE, *Nuevo derecho procesal...*, cit., pp. 189–190.
17. *Comm.* 11 (1979), p. 88.
18. Cf. S. VILLEGGIANTE, "Le questioni incidentali," cit., pp. 652–655.

then, unless the mandate received from the college directs otherwise, the investigating judge, under c. 1428 § 3 (cf. c. 1093 § 3 *CCEO*) "potest ... interim decidere quae et quomodo probationes colligendae sint."

Since the competence to decide an incidental matter—and thus also the competence to determine whether the conditions set forth in the Code for admitting an incidental matter exist—cannot be ascribed to anyone other than the judge that the law legitimizes to decide the principal matter, the instructor's decision can only be a provisional or interim decision, an *interim decidere,* as c. 1428 § 3 (cf. c. 1093 § 3 *CCEO*) states. Therefore, it is always possible to petition (or, more properly speaking, file a *remonstratio*[19]) before the college against the decree of the instructor,[20] and all the more so if it is taken into account that a collegiate tribunal, according to c. 1426 § 1 (cf. c. 1085 § 1 *CCEO*), must proceed collegially. This principle of collegiality must be applied, particularly at fundamentally important times, such as when a decision on the principal matter or incidental matters is to be made. Incidental matters, properly speaking, must, at least to some extent, affect the principal matter. This is expressly stated in c. 1085 § 1 *CCEO,* in that it establishes the obligation to deliberate by majority vote of the college, "ad validitatem quidem," when deciding to deny a petition for an incidental matter or recourse against the presiding judge's decision.

This interpretation may find new confirmation in c. 1527 § 2 (cf. c. 1208 § 2 *CCEO*), which provides that "ipse iudex [which in this case can only be the college: see commentary on c. 1587[21]] rem expeditissime definiat" if the party appeals a decision finding evidence inadmissible. Finally, it is possible to find a last support, by analogy, in c. 1505 § 4 (cf. c. 1188 § 4 *CCEO*), which provides for recourse before the college of a decision by the presiding judge in the case of preliminary or pre-trial matters (the *reiectio libelli*), and in article 73 of the *Normae* of the Rota Tribunal (cf. also art. 96 of the 1982 *Normae*), which can surely be considered as a collegial tribunal par excellence among the judges of the Church: "Adversus actum aut decretum a Ponente vel a Iudice instructore positum recursus patet ad Turnum, nisi agatur de decretis mere ordinatoriis; quaestio autem expeditissime definienda erit."

Once these clarifications have been made, it becomes clear which decision completes this first phase related to incidental matters. It is a decree, which, according to c. 1617 (cf. c. 1300 *CCEO*), must explain the motives under penalty of nullity; and by virtue of this decree, the judge that is

19. Cf. ibid., p. 655.

20. Cf. the jurisprudence of the Roman Rota which, in these cases, has avoided granting recourse to this apostolic tribunal instead of to the college: S. VILLEGGIANTE, "Le questioni incidentali," cit., note 15, p. 653.

21. Cf. S. VILLEGGIANTE, "Le questioni incidentali," cit., p. 655, S. BERLINGÒ, "Il processo," in E. VITALI-S. BERLINGÒ, *Diritto matrimoniale canonico* (Milan 1989), p. 248.

competent for the principal matter—whether it is a sole judge or a collegial tribunal, depending on what the law requires for each case—decides the admissibility of an incidental matter, denies it, or maybe postpone all consideration of it until the decision is made on the principal matter. That decision—not the merely provisional decision of the instructing judge—is the decision that must be handed down *expeditissime* according to c. 1589 § 1 (cf. c. 1269 § 1 *CCEO*). Under c. 1629, 5° (cf. c. 1310, 5° *CCEO*) it is unappealable.[22]

22. Cf. S. VILLEGGIANTE, "Le questioni incidentali," cit., p. 654.

1590 **§ 1. Si quaestio incidens solvi debeat per sententiam, serventur normae de processu contentioso orali, nisi, attenta rei gravitate, aliud iudici videatur.**

§ 2. Si vero solvi debeat per decretum, tribunal potest rem committere auditori vel praesidi.

§ 1. If the incidental matter is to be decided by judgement, the norms for an oral contentious process are to be observed unless, because of the gravity of the issue, the judge deems otherwise.

§ 2. If it is to be decided by decree, the tribunal can entrust the matter to an auditor or to the presiding judge.

SOURCES: § 1: c. 1840 § 2; *NSRR* 111; *PrM* 191
§ 2: c. 1840 § 2; *NSRR* 112; *PrM* 192 § 1

CROSS REFERENCES: —

COMMENTARY

Piero Antonio Bonnet

Treatment and decision of incidental causes

Canon 1589 § 1 (cf. c. 1269 § 1 *CCEO*) leaves it to the prudent discretion of the judge deciding the admissibility of an incidental matter to determine also its gravity and consequently, whether the incidental matter should be decided by a decree or by an interlocutory judgment. In the latter case, under c. 1590 § 2 (cf. c. 1270 § 2 *CCEO*), the tribunal may further elect to refer an incidental matter to the presiding judge of the college or an auditor. On the other hand, if the matter is to be decided by a decree, the procedure to be followed, according to c. 1590 § 1 (cf. c. 1270 § 1 *CCEO*), unless the judge deems it advisable to proceed otherwise because of the gravity of the incidental matter, is the norm for the oral contentious process[1] (cc. 1656–1670), as summarized in the *CCEO* (cf. cc. 1343–1356).[2] However, c. 1085 § 1, 3° *CCEO* stipulates the requirement that the

1. Regarding the importance of the principle of orality for Canon Law, cf. A. NICORA, *Il principio di oralità nel diritto civile italiano e nel diritto processuale canonico* (Rome 1977).

2. Regarding that qualification in Church Law, cf. Z. GROCHOLEWSKI, "Natura e oggetto del processo contenzioso sommario," in *Ephemerides iuris canonici*, 34 (1978), pp. 114–143; cf. also P.A. BONNET, *Il giudizio di nullità matrimoniale nei Casi speciali* (Rome 1979), pp. 53–77.

decision—whether in the form of an interlocutory judgment or a decree—must always be made, "ad validitatem quidem," by the college and thus with at least the majority vote of the judges of the college, if the judicial decision is to have the force of a definitive judgment, according to c. 1301 *CCEO*.

With respect to the oral contentious process, it seems to us that it is a special "non ratione materiae, sed 'ratione formae'" process characterized by having "tamquam suum genus, iudicium contentiosum, a quo deflectit in summa celeritate qua gaudet."[3] In reality, even though it has the elements essential to every process, it is a uniquely simplified procedure, so much so that, according to c. 1676 (cf. also c. 1356 *CCEO*, which is substantially the same), "Tribunal ... potest suo decreto, motivis praedito, normis processualibus, quae non sint ad validitatem statutae, derogare, ut celeritati, salva iustitia, consulat."

Given these characteristics, it is evident that the oral process is particularly well suited to the spirit of the canonical process.[4] Also, this procedure is intertwined[5] with the tradition—and not just in the canonical sphere—of the summary process (which is also the term that is used in *CCEO*), which, by being celebrated "de plano et absque iudiciorum strepitu" (*X* V, 1, 26), became "non secundum rigorem iuris, sed secundum temperantiam aequitatis" (*X* V, 3, 32). Indeed, this renowned canonical tradition, which is based on the decretal *Saepe* (*Clem.* V, 11, 2), became "quod processus expedietur breviter ... non ... tamen ita ... quod excluderet causae cognitionem, quae est de substantia iudicii."[6] The oral process was especially consistent with the procedural requirements seen in the people of God with particular urgency, precisely in that it tended to restrict "dispendiosam prorogationem litium, quam interdum ex subtili ordinis iudiciarii observatione causarum docet experientia provenire" (*Clem.* II, 1, 2).

However, we cannot fail to mention a problem that is related to this particular process: the admissibility of the oral contentious process in incidental matters arising in the course of the controversy relative to marriage nullity cases.[7] Above all, the question arises because the competent judge for these cases, under c. 1425 § 1, 1° (cf. c. 1084 § 1, 2° *CCEO*), is collegial, and c. 1426 § 1 (cf. c. 1085 § 1 *CCEO*) requires the collegial process, whereas the oral contentious process is to take place in the first instance before a sole judge, according to c. 1657, which has a provision that has

3. In *Comm.* 8 (1976), pp. 191 and 192.
4. Cf. P.A. BONNET, "Processo, XIII; processo canonico: profili generali," in *Enciclopedia giuridica*, XXIV (Rome 1991), pp. 3–5 (of the entry).
5. Cf. *Comm.* 8 (1976), p. 192.
6. J. DE LIGNANO, "Super clementina 'Saepe'" in *Quellen zur Geschichte des römisch-kanonischen Prozesses im Mittelalter*, 4. Band, 6 (Heft Aalen 1962), p. 8.
7. S. VILLEGGIANTE, "Le questioni incidentali," in P.A. BONNET-C. GULLO (Eds.), *Il processo matrimoniale canonico*, 2nd ed. (Vatican City 1994), pp. 656–657.

not been expressly set forth in *CCEO*.[8] In particular, this problem arises because under c. 1691 (cf. c. 1376 *CCEO*), the process for marriage nullity cases should be governed by the set of canonical norms set forth for cases in general and for the ordinary contentious process in particular, unless the peculiar nature of these cases merits otherwise. Therefore, the oral contentious norms are not invoked in this last norm. On the contrary, their admissibility in these cases is expressly excluded under c. 1690 (cf. c. 1375 *CCEO*), to the extent that following these norms in such cases results in nullity of judicial acts according to c. 1656 § 2 (cf. c. 1343 § 2 *CCEO*), with the final result imposed by c. 1669 (cf. c. 1353 *CCEO*): "si tribunal appellationis perspiciat in inferiore iudicii gradu processum contentiosum oralem esse adhibitum in casibus a iure exclusis, nullitatem sententiae declaret et causam remittat tribunali quod sententiam tulit."

Incidental matters, even those having a peculiar object distinct from the principal matter—which does not cease to have relevant consequences in certain aspects—cannot, however, cease to be considered as integral parts of the nature of the process related to the principal matter, which they necessarily affect. Thus, c. 1085 § 1 *CCEO* provides: "Tribunal collegiale collegialiter procedere debet et ad maiorem numerum suffragiorum decisiones ferre, ad validitatem quidem, si agitur 1° de reiectione petitionis ... causae incidentis."

We are not convinced by the otherwise authorized opinion that invokes c. 1591 (cf. c. 1271 *CCEO*) and sets up a parallel with the norms for recourse before the college against the instructing judge's provisional judgment in the first phase of the proceedings and recourse before the college against a sole judge's interlocutory judgment handed down in an oral contentious process. These sources affirm that, "in the first phase, recourse before the college is possible because the instructing judge's decree is necessarily provisional in cases like marriage nullity, whose hearing is reserved to a three-judge college, whereas in the second phase, recourse before the college is possible because, 'iusta intercedente ratione,' the law allows it."[9] This parallel, which does not convince us completely, might indicate a feasible solution for deciding a problem specifically having to do with a sole judge in an oral contentious process in cases where the law stipulates a collegial tribunal, but in any case, it does not suffice to overcome the exclusion of the oral contentious process set forth in cc. 1691 and 1690 (cf. cc. 1376 and 1375 *CCEO*).

8. In the *CCEO* c. 1084, after having foreseen in §1 the cases reserved for the collegial tribunal of three judges, establishes in § 2 that: "Ceterae causae tractantur a iudice unico, nisi Episcopus eparchialis certam causam collegium trium iudicum reservet."

9. S. VILLEGGIANTE, "Le questioni incidentali," cit., p. 657.

To be sure, the question of any remedy against a decision settling an incidental matter is of great relevance.[10] Above all, for certain specific incidental matters, the Code expressly provides that the judge must decide these matters *expeditissime*. This is true in the case of challenges according to c. 1451 § 1 (cf. c. 1109 § 1 *CCEO*), the inadmissibility of proofs according to c. 1527 (cf. c. 1208 *CCEO*), or the right to appeal according to c. 1631 (cf. c. 1313 *CCEO*). In these cases, no appeal is allowed according to c. 1629, 5° (cf. c. 1310, 5° *CCEO*).

On the other hand, the problem of the possibility of appeal arises in other cases, since proceeding *expeditissime* is not prevented in the general character under c. 1590 (cf. c. 1270 *CCEO*). We must ask ourselves whether unappealability derives from c. 1629, 4° (cf. c. 1310, 4° *CCEO*), which reads, "Non est locus appellationi. ... 4° a iudicis decreto vel a sententia interlocutoria, quae non habeat vim sententiae definitivae, nisi cumuletur cum appellatione a sententia definitiva."

In order to try to understand this difficult norm, it is necessary to note that it definitively resolves the doubt that lingered on this subject under the *CIC*/1917,[11] c. 1860, 6°, which, in literally stipulating unappealability "a iudicis decreto vel a sententia interlocutoria, quae non habeat vim definitivae," indicated by the singular form ("*habeat*") that the definitive aspect—and therefore the possibility of appeal—had to do with interlocutory judgments only. In contrast, article 214 § 1 *PrM* broadly interpreted—and at this point, the issue became complicated with an argument over the juridical force of this document[12]— the definitive character as applying to decrees also.

John Paul II's codes have taken the latter approach, about which it has been critically observed that "if ... in the law enacted in the Pio-Benedictine Code, the question had been brilliantly resolved of the inpugnability of pronouncements that are merely sentences in nature or character, allowing appeals only for interlocutory judgments, whereas pronouncements of a natural decision, as well as definitive judgments, in the new law of the ... Code, in expressly recognizing the possibility of applying the open clause on the definitive character to judicial decrees also, which always appears as a decision made by a judge without hearing both parties, one winds up implicitly admitting that this clause may also apply to a judicial judgment that does not decide anything, but is an order or a

10. Cf. J.J. GARCÍA FAÍLDE, *Nuevo derecho procesal canónico (estudio sistemático-analítico comparado)*, 2nd ed. (Salamanca 1992), pp. 191–192; S. VILLEGGIANTE, "Le questioni incidentali," cit., pp. 657–665.

11. Cf. P. PELLEGRINO, *I provvedimenti interlocutori nella teoria canonistica delle impugnazioni* (Padova 1969).

12. Cf. E.M. EGAN, *The Introductory of a New 'Chapter of Nullity' in Matrimonial Courts of Appeal. A Study of Legislation in the Code of Canon Law and the Instruction "Provida Mater Ecclesia"* (Rome 1967), pp. 3–79.

directive."[13] This logical and juridical defect certainly does not arise in incidental matters, where the contradictory is never absent, even if the judge believes he should proceed by means of a decree.[14] In these cases, given a relevant relationship between incidental matters and the principal matter, the right of defense would be fatally harmed,[15] which would then entail the sanction of irremediable nullity under c. 1620, 7° (cf. c. 1303 § 1, 7° *CCEO*). In addition, *a fortiori*, c. 1589 § 1 (cf. c. 1269 § 1 *CCEO*) imposes on the judge the obligation to hear the parties before handing down a judgment ending the first phase of this proceeding.

Therefore, in light of the Code, it can be said that decisions are unappealable in cases where they cannot be considered definitive. This is corroborated by c. 1618 (cf. c. 1301 § 1,7° *CCEO*) in three situations: when a decree or interlocutory judgment affecting one or both parties hinders the case, ends one of the grades thereof, or ends the case itself. With this norm, as we have pointed out, the criteria were abandoned that had been in effect earlier in marriage nullity cases by virtue of *PrM* 214 § 2, under which "sententia vel decretum tunc censetur vim habere definitivae, quum gravamen inferant, quod non potest per definitivam sententiam reparari." This being the case, it would seem that requirements for a search for the truth are sacrificed on the altar of the speediness of the process, and therefore that justice, at least in appearance, has been sacrificed. Unfortunately, justice and truth, even though closely interrelated—the truth on the grounds for the case cannot help but be itself also justice and charity and cannot be sought procedurally in any way other than through a just procedure—nevertheless do not always obtain together in every case, at leastnot in a plain and simple way. In reality, if the harm is not repairable in the definitive judgment, the search for the truth *could* thereby be compromised. But, since it would not be possible at all (nor would it be just in and of itself) in ecclesial law, that "some kind of recourse against alleged formal unappealability will always be found (cf., but only as an example, c. 1631; cf. also c. 1313 *CCEO*), thus avoiding the search for speediness at all costs, with the ultimate consequence that in the end, it is the criteria of harm that prevails, at least as a substantial unavoidable requirement [of truth and justice]. And this is no small matter."[16]

However, in spite of the reservations that may be raised, the system provided in the Code (and also in *CCEO*) for appealing judgments that put an end to incidental matters turns out to be quite balanced, since it manages to blend rather well the requirements for an effective search for the truth with the requirements for speediness and justice in general. In fact, appealability applies not only to decrees and interlocutory sentences that

13. P. PELLEGRINO, "Sull'impugnabilità dei provvedimenti interlocutori nel nuovo codice di diritto canonico," in *Scritti in memoria di Pietro Gismondi*, II/2 (Milan 1991), p. 128.
14. Cf. S. VILLEGGIANTE, "Le questioni incidentali," cit., pp. 650–651.
15. Cf. P.A. BONNET, "Processo...," cit., pp. 6–11 (of the entry).
16. S. VILLEGGIANTE, "Le questioni incidentali," cit., p. 660.

conclude a phase, including those that apply to one of the parties, only to the judgment of the principal matter, or to one of the grades thereof, but also to those that in any way constitute an impediment to a judgment of the principal matter. In other cases, judgments on incidental matters are unappealable to avoid excessively—and therefore unjustly—prolonged litigation, but the rigorousness of this procedural situation, which could be prejudicial to a genuine search for the truth, is tempered by the possibility of revocation under c. 1591 (see commentary; cf. also c. 1271 *CCEO*).

Further, the decisions in question are subject to *querela nullitatis*.[17] Certainly, it would be quite difficult to deny this recourse in this case, since it would be unthinkable to construct a serious, just procedural avenue to the truth on a judgment tainted by any of the defects[18] mentioned in cc. 1620 and 1622 (cf. cc. 1303 § 1 and 1304 § 1 *CCEO*). Moreover, there is no lack of a basis in positive canon law for alleging the possibility of *querela nullitatis* in this context. Suffice it to say that c. 1460 § 2 (cf. c. 1119 § 2 *CCEO*), after having stipulated the unappealability of a judgment in which a judge, in deciding a matter arising from an exception alleging relative incompetence, decides in favor of competence, adds: "At non prohibetur querela nullitatis et restitutio in integrum" (c. 1119 § 2 *CCEO* even adds a third-party opposition also, a remedy that is no longer available in the Latin Code). Further, it must not be forgotten that the norms regulating the activity of the Roman Rota allow *querela nullitatis* in incidental matters as important as those arising over the right to appeal.[19]

A peculiar remedy, the *restitutio in integrum*[20] should also be allowed in general for these pronouncements. It may be petitioned, as we have just seen, under c. 1460 § 2 (cf. c. 1119 § 2 *CCEO*) against judgments finding that a judge is competent in cases where an exception for relative incompetence has been brought. In fact, it would have been completely inconsistent according to the spirit of ecclesial law to attempt to determine the truth by appealing to divine law by means of a procedural instrument. To arrive at a pronouncement tainted procedurally with one of the grave defects that, according to c. 1645 § 2 (cf. c. 1326 § 2 *CCEO*), clearly constitutes an injustice to the procedural *iter* cannot help but be reflected also in the judge's decision.

Nevertheless, the problem of the motive that is necessary in order to resort to this remedy, which is a *res judicata* (according to c. 1645 § 1; cf. c. 1326 § 1 *CCEO*), must be resolved.[21] There is reason to doubt that a decree or an interlocutory judgment would be likely to become a *res*

17. Ibid., pp. 665–667.
18. Cf. P.A. BONNET, "Processo...," cit., pp. 18–19.
19. Cf. art. 106 (cf. also art. 159 *NSRR* 1934), along with c. 1445 § 1,1° and *PB* 122,1°.
20. Cf. S. VILLEGGIANTE, "Le questioni incidentali," cit., pp. 667–672.
21. Cf. P.A. BONNET, "Giurisprudenza, II. giurisprudenza canonica," in *Enciclopedia giuridica*, XV (Rome 1988), pp. 6–7 (of the entry).

judicata, even more so if they are subject to revocation or reform under c. 1591 (cf. 1271 *CCEO*) until such time as the principal matter is settled. However, the latest jurisprudence from the Roman Rota, even under *CIC*/1917, had also affirmed that these judgments could become a *res judicata*.[22] Under current legislation the unappealable judgments mentioned under c. 1629, 4°–5° (cf. c. 1310, 4°–5° *CCEO*) may become a *res judicata* for the purposes of c. 1641, 4°, which expressly refers to this norm. A substantially identical conclusion can be reached on the basis of c. 1322, 4° *CCEO*). This being the case, the norm sanctioned by c. 1460 § 2 (cf. c. 1119 § 2 *CCEO*) is simply an application of the general normative solution to a specific case. Express mention of it is made because of its importance and also because of the abuses that led Paul VI to say in his address to the tribunal of the Roman Rota on January 28, 1978: "We should ... point out with sorrow the tendency to instrumentalize certain concessions, caused by rather limited situations, to get to the point of virtually evading canonical procedural law to which there is an obligation to follow, and this is often done by artificially setting up fictitious domicile or addresses."[23]

However, a problem could still arise for incidental matters raised during a *de statu personarum* case, since c. 1641 does not override c. 1643 (the same is true in the case of cc. 1322 and 1324 *CCEO*), which excludes a *res judicata* in cases related to the status of persons. But incidental matters do have a proper *petitum* that generally does not refer to the status of persons, such that judgments deciding incidental matters arising during cases of this type may become a *res judicata* and thus may be subject to this remedy, which is as unique as it is important (i.e., *restitutio in integrum*). It may be concluded, then, that even though judgments concluding incidental matters are generally unappealable, a *querela nullitatis* and quite often *restitutio in integrum* also are available against them.

22. Cf. S. VILLEGGIANTE, "Le questioni incidentali," cit., note 31, p. 669.

23. In *AAS* 70 (1978), p. 183. Cf. A. SABATTANI, "Le impugnative delle decisioni incidentali," in *Cause incidentali e processo contenzioso sommario ossia orale nella dinamica della revisione del diritto processuale canonico* (Rome 1988), p. 98.

1591 Antequam finiatur causa principalis, index vel tribunal potest decretum vel sententiam interlocutoriam, iusta intercedente ratione, revocare aut reformare, sive ad partis instantiam, sive ex officio, auditis partibus.

Before the principal matter is concluded, the judge or the tribunal may for a just reason revoke or alter an interlocutory judgement or decree. This can be done either at the request of a party or ex officio by the judge after he has heard the parties.

SOURCES: c. 1841; *NSRR* 114 § 2; *PrM* 195

CROSS REFERENCES: —

COMMENTARY

Piero Antonio Bonnet

Revocation and alteration of the decision

This norm (which is substantially the same in c. 1271 *CCEO*) contains a provision that is traditional in canon law. There was a similar norm in c. 1841 *CIC*/1917, and in article 195 *PrM* and c. 365 *SN* as well. Although the former law formally mentioned interlocutory judgments only, the norm could nevertheless not fail to find application also to decisions made by judges through decrees, in accordance with the old *regula XXI* of *Liber Sextus*: "cui licet quod est plus, licet utique quod est minus."

As far as judgments deciding interlocutory matters are concerned, the judge has power that is certainly unique in comparison with that which he possesses regarding decisions on principal matters, since he does not lose his authority to decide as he does in the latter case, in the event of an exception for the new examination by *querela nullitatis* under cc. 1621 and 1624 (cf. cc. 1303 § 2 and 1305 *CCEO*) or *restitutio in integrum* under c. 1646 § 1 (cf. c. 1327 § 1 *CCEO*). In fact, in incidental matters, the judge can revoke or amend judgments already made prior to conclusion of the principal matter, provided a just cause, in his opinion, exists. This is a discretionary power of great importance, since it has been placed *in manu iudicis* as a precious instrument to guarantee justice and truth,[1] not only in a general sense, but also in a specific sense, to prevent

1. Cf. P.A. BONNET, "'Continuità' e 'discontinuità' nel diritto ecclesiale e nell'esperienza giuridica totale dell'uomo," in G. BARBERINI (Ed.), *Raccolta di scritti in onore di Pio Fedele*, I (Perugia 1984), pp. 31–54, and above all, "Comunione ecclesiale e diritto," in "Comunione e disciplina ecclesiale. Atti del XXII Congresso dell'associazione Canonistica Italiana, Aosta, 10–13 settembre 1990," (Vatican City 1991), pp. 49–86, in *Monitor ecclesiasticus* 116 (1991) pp. 49–86; also in P.A. BONNET, *Comunione ecclesiale, Diritto e Potere. Studi di diritto canonico* (Turin 1993), pp. 7–51.

the requirements for speediness, which not uncommonly results in declaring judgments on incidental matters unappealable, from hindering the search for the truth.

A judge may exercise this power to revoke or amend ex officio or at the petition of private or (under c. 1434, 2°; cf. c. 1098, 2° *CCEO*) public parties, if said public parties are present at the proceeding. On the other hand, a judge cannot make decisions involving revocation or amendment without having heard the parties, including public parties if present at the trial, according to c. 1342, 1° (cf. c. 1098, 1° *CCEO*). It is only from a hearing of the parties that the judge can obtain all the elements necessary for a correct and complete assessment of the existence, quality, and seriousness of the grounds that may lead him to revise a decision already made. Further, by also considering the relationship between the incidental matter and the principle matter, a judge should consider that omitting the hearing of the parties may constitute *vulnus* of the right of defense, which would result in irremediable nullity of the eventual decision handed down by the judge under c. 1620, 7° (cf. c. 1303 § 1 *CCEO*).

A decision to revoke or amend a pronouncement must be made by the competent judge, and therefore if collegial, by the college,[2] even if the decree being amended or revoked was handed down by the auditor or the presiding judge, under c. 1590 § 2 (cf. c. 1270 § 2 *CCEO*); it must be presumed that they, in handing down said decision, have exhausted the power received. A judgment, in addition to the requirement of a hearing of the parties, must be grounded briefly on arguments of law and fact, especially in cases when a decision on an incidental matter is appealable, because "qui petiit a iudice revocationem et, ut ecce non obtinuit nisi ex parte vel nullimodi obtinuit ius non amisit interponendi appellationem, etsi expresse sibi non reservaverit hoc ius actu quo petiit *revocationem*."[3] In any case, when an interlocutory judgment is appealable, no petition may be brought against either a revoked decision or a decision that a judge has indicated he intended to revise.[4] judge's decision on whether or not to proceed to revoke or amend a judgment is not subject to appeal,[5] since the legislator has left this entirely to the judge's judicial discretion (*potest*).

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2. Cf. J.L. ACEBAL, commentary on c. 1591, in *Salamanca Com.*

3. M. LEGA-V. BARTOCCETTI, *Commentarius in iudicia ecclesiastica, iuxta codicem iuris canonici*, II (Rome 1950), p. 861.

4. Cf. J.J. GARCÍA FAÍLDE, *Nuevo derecho procesal canónico (estudio sistemático-analítico comparado)*, 2nd ed. (Salamanca 1992), p. 193.

5. Cf. ibid.

CAPUT I
De partibus non comparentibus

CHAPTER I
The Non-Appearance of Parties

1592 **§ 1. Si pars conventa citata non comparuerit nec idoneam absentiae excusationem attulerit aut non responderit ad normam can. 1507 § 1, iudex eam a iudicio absentem declaret et decernat ut causa, servatis servandis, usque ad sententiam definitivam eiusque exsecutionem procedat.**

§ 2. Antequam decretum, de quo in § 1, feratur, debet, etiam per novam citationem si opus fuerit, constare citationem, legitime factam, ad partem conventam tempore utili pervenisse.

§ 1. If a respondent is summoned but does not appear, and either does not offer an adequate excuse for absence or has not replied in accordance with can. 1507 § 1, the judge is to declare the person absent from the process, and decree that the case is to proceed to the definitive judgement and to its execution, with due observance of the proper norms.

§ 2. Before issuing the decree mentioned in § 1, the judge must make sure, if necessary by means of another summons, that a lawful summons did reach the respondent within the canonical time.

SOURCES: § 1: cc. 1842, 1843 § 1, 1844; *NSRR* 69 § 1, 70 § 1; *PrM* 89 §§ 1 et 2
§ 2: c. 1843 § 1,1° et § 2; *NSRR* 69 § 2; *PrM* 89 § 2

1593 **§ 1. Si pars conventa dein in iudicio se sistat aut responsum dederit ante causae definitionem, conclusiones probationesque afferre potest, firmo praescripto can. 1600; caveat autem iudex, ne de industria in longiores et non necessarias moras iudicium protrahatur.**

§ 2. Etsi non comparuerit aut responsum non dederit ante causae definitionem, impugnationibus uti potest adversus sententiam; quod si probet se legitimo impedimento fuisse detentam, quod sine sua culpa antea demonstrare non potuerit, querela nullitatis uti potest.

§ 1. If the respondent thereafter appears before the judge, or replies before the trial is concluded, he or she can bring forward conclusions and proofs, without prejudice to the provisions of Can. 1600; the judge is to take care, however, that the process is not deliberately prolonged by lengthy and unnecessary delays.

§ 2. Even if the respondent has neither appeared nor given a reply before the case is decided, he or she can challenge the judgement; if the person can show that he or she was impeded by a legitimate cause and was without fault in not being able to prove this hitherto, a plaint of nullity can be lodged.

SOURCES: § 1: c. 1846; *NSRR* 116
§ 2: c. 1847

CROSS REFERENCES: —

COMMENTARY

Piero Antonio Bonnet

Absence of the respondent

The discipline given in cc. 1592–1595 (cf. cc. 1272–1275 *CCEO*)[1] modifies the norms contained in cc. 1842–1851 *CIC*/1917.[2]

1. Cf. in general J.J. GARCÍA FAÍLDE, *Nuevo derecho procesal canónico (estudio sistemático-analítico comparado)*, 2nd ed. (Salamanca 1992), pp. 103–109.

2. Cf. in this respect F. DELLA ROCCA, "Rassegna di giurisprudenza in materia processuale. Contumacia," in *Archivio di diritto ecclesiastico* 4 (1942), pp. 397–399; idem, "La contumacia," in *Appunti sul processo canonico* (Milan 1960), pp. 47–54; idem, "Note critiche sulla contumacia nella dottrina del Duranti e dello Scaccia," in *Saggi di diritto processuale* (Padova 1960), pp. 101–120; H. STRAUB, "Die *Contumacia* im Kirchlichen Eheprozess," in K. SUPEN-J. WAEITZEL-P. WIRTH (Eds.), *Ecclesia et ius. Festgabe für Audomar Scheuermann zum 60. Geburstag, Dagerbracht von seinem Freunden und Schulern* (Munich-Paderborn-Vienna 1968), pp. 609–629.

In the new legislation, in addition to greater simplicity and clarity of the wording of the norms, there seems to be a different prevailing orientation of the very institute being regulated. The former regulation was based on the principle that the parties' absence in the proceedings constituted above all disobedience of an order of a judicial authority, which was even subject to canonical penalties to ensure obedience. The new discipline seems to be informed principally by the concept that absence signifies the will of the absent parties to renounce the right to appear in court, an attitude for which they assume liability. This is a behavior that the norms allow, but correcting it is also encouraged by making possible a subsequently active appearance at the trial, due to the importance of the parties' cooperation with the judge in the search for the truth. However, the efficacy of this cooperation is dependent on a free and convinced personal decision.

Absence of a respondent occurs when a duly summoned respondent does not appear before a judge or does not reply in writing in accordance with c. 1507 § 1 (cf. c. 1190 § 1 *CCEO*) and does not provide an acceptable explanation. In such cases, a judge, having first confirmed that a summons was served in useful time and having considered an eventual need to serve another summons, declares the absence of the respondent in a decree and at the same time orders the trial to proceed to the judgment and its execution.

If the respondent appears in court prior to the decision of the case, he or she may introduce evidence and conclusions, which—if the acts of the case have already been published—shall be subject to c. 1600 (cf. c. 1283 *CCEO*). This norm provides a particularly appropriate discipline[3] for persuading a respondent to reconsider his or her intent not to appear and encourage a respondent to offer the judge his or her cooperation, which must be considered precious for a just acquisition of the truth. However, a respondent's change of mind, which is certainly encouraged by this well-intended norm, must not become obstructionist or dilatory, and therefore unjust, procedural behavior; this is why the norm rightfully imposes on judges a duty to prevent this possibility.

Subsequent to the decision in the case, an absent respondent may still appear in the case by submitting, in accordance with the law, any allowable challenge, as if he/she had participated in the proceedings. Once again, such appearances in cases are encouraged, even if late, since they may always be decisive for the search for the truth. Further, if an absent respondent can show that his or her procedural status was due to a legitimate impediment that he or she was unable to explain earlier in the case, he or she may petition *querela nullitatis* under cc. 1593 § 2 and 1622, 6° (cf. cc. 1273 § 2 and 1304 § 1, 6° *CCEO*).

3. Cf. L. MADERO, commentary on c. 1593, in *Pamplona Com.*

This is an instance of remediable nullity of a judgment, which must consequently be petitioned under c. 1623 (cf. c. 1324 § 2 *CCEO*) and under penalty of lapsing,[4] within a peremptory three-month time limit commencing upon publication of the judgment. It has been noted in this regard, "But it could be that declaring a litigant 'absent' with no objectively legitimate cause would prevent the litigant from exercising his or her right of defense, and therefore, the complaint would be a complaint for the irremediable nullity of a judgment per c. 1620, 7°"[5] (cf. c. 1303 § 1, 7° *CCEO*).

In that case, it seems to us that the record should state that the case proceeded completely without adversarial action because of an impediment that could not be overcome by a party, and the judgment should therefore not be considered null and void, but rather canonically non-existent.[6] In fact, an essential element of the "set of conditions that make a trial a trial" is missing, since "They had not been devised by legislation or legislators that could have organized things differently," but rather "they are, if you will, profound and insuperable inventions of life in the sense that a case can be such to the extent that it is carried out under those conditions."[7] In reality, if a trial is held with no adversarial action, without it being satisfactorily justified, it could not be called a trial in the proper sense of the term (i.e., a just dialectic in search of the truth). Rather, it should be considered—in the event that it was imposed/on parties who are absent through no fault of their own—an act of injustice that unavoidably harms the i,[8] which is the only parameter in the Church that makes man man through the law.[9]

4. Cf. P.A. BONNET, "Prescrizione, IV; diritto canonico (n. 6 decadenza)," in *Enciclopedia giuridica*, XXIV (Rome 1991), pp. 6–8 (of the entry).

5. J.J. GARCÍA FAÍLDE, *Nuevo derecho procesal...*, cit., p. 109. Cf. also J.L. ACEBAL, commentary on c. 1593, in *Salamanca Com.*

6. Cf. P.A. BONNET, "Processo, XIII; processo canonico: profili generali," in *Enciclopedia giuridica*, XXIV (Rome 1991), pp. 18–19 (of the entry).

7. G. CAPOGRASSI, "Il 'quid ius' ed il 'quid iuris' in una recente sentenza," in *Opere*, V (Milan 1953), p. 23.

8. Cf. P.A. BONNET, "Carità e diritto: la dimensione comunitaria quale momento della struttura interna del diritto della Chiesa," in *Investigationes theologico-canonicae* (Rome 1978), pp. 75–98.

9. Cf. P.A. BONNET, "Comunione ecclesiale e diritto," in "Comunione e disciplina ecclesiale. Atti del XXII Congresso dell'Associazione Canonistica Italiana, Aosta, 10-13 settembre 1990" (Vatican City 1991), pp. 49–86, in *Monitor ecclesiasticus* 116 (1991), pp. 49–86; also in P.A. BONNET, *Comunione ecclesiale, Diritto e Potere. Studi di diritto canonico* (Turin 1993), pp. 7–51.

1594 **Si die et hora ad litis contestationem praestitutis actor neque comparuerit neque idoneam excusationem attulerit:**

1° iudex eum citet iterum;

2° si actor novae citationi non paruerit, praesumitur instantiae renuntiasse ad normam cann. 1524–1525;

3° quod si postea in processu intervenire velit, servetur can. 1593.

If the plaintiff does not appear on the day and at the hour arranged for the joinder of the issue, and does not offer a suitable excuse:

1° the judge is to summon the plaintiff again;

2° if the plaintiff does not obey the new summons, he or she is presumed to have renounced the trial in accordance with cann. 1524–1525;

3° if the plaintiff should want to intervene at a subsequent stage in the process, the provisions of Can. 1593 are to be observed.

SOURCES: c. 1849; *NSRR* 74; *PrM* 91 § 1

CROSS REFERENCES: —

COMMENTARY

Piero Antonio Bonnet

Absence of the petitioner

A petitioner may also adopt an attitude similar to the respondent who decides to remain absent in the proceeding (cf. cc. 1592–1593) (i.e., not to appear in a process and not provide a suitable excuse). Canons 1849–1850 *CIC*/1917 addressed the absence of either the petitioner or respondent identically and considered it contumacious. In the event of an unjustified absence of parties, current codal legislation provides that a decree by the judge in the event of the respondent's absence allows the trial to go forward, once the respondent's intent to renounce the action has been established (c. 1592; cf. c. 1272 *CCEO*), whereas if the petitioner is absent, proof of absence signifies presumption of his/her intent to withdraw the complaint in the terms of cc. 1524–1525 (cf. cc. 1204–1206 *CCEO*). But it is necessary that the judge order another summons of the petitioner in order to be able to legitimately presume the petitioner's intent.

As in any other case of renunciation of an instance, it may be admitted by the judge by decree, and would have the same effect as inactivity, and thus the procedural acts would be extinguished only if the renunciation is accepted by the respondent. In reality, the respondent, in the event of an absence of the petitioner that is considered to be without cause, may opt to accept the renunciation under c. 1524 § 3 (cf. c. 1202 § 3 *CCEO*) or not accept it and thus continue the trial in the plaintiff's absence, "since the presentation of the petition by the plaintiff implies a *diffamatio iudicialis*, and it is the respondent's right that the process continue until the issuance of the sentence."[1]

The provisions set forth in no. 3° of the canon we are commenting on here (cf. also c. 1274, 3° *CCEO*) consider just such a possible continuation of the trial by providing for the possibility of a subsequent appearance in the case by the petitioner, in which case the same provisions set forth in c. 1593 (cf. c. 1273 *CCEO*) for the respondent must be applied. These provisions, in the interest of the search for the truth, tend to encourage his or her involvement in the process.

1. L. MADERO, commentary on c. 1594, in *Pamplona Com.*

1595 **§ 1. Pars absens a iudicio, sive actor sive pars conventa, quae iustum impedimentum non comprobaverit, tenetur obligatione tum solvendi litis expensas, quae ob ipsius absentiam factae sunt, tum etiam, si opus sit, indemnitatem alteri parti praestandi.**

§ 2. Si tum actor tum pars conventa fuerint absentes a iudicio, ipsi obligatione expensas litis solvendi tenentur in solidum.

§ 1. A party, whether plaintiff or respondent, who is absent from the trial, and who does not establish the existence of a just impediment, is bound to pay the expenses which have been incurred in the case because of this absence, and also, if need be, to indemnify the other party.

§ 2. If both the plaintiff and the respondent were absent from the trial, they are jointly bound to pay the expenses of the case.

SOURCES: § 1: c. 1851 § 1; *PrM* 90
§ 2: c. 1851 § 2

CROSS REFERENCES: —

COMMENTARY

Piero Antonio Bonnet

Sentence to pay costs and obligation of the absent parties to indemnify.

This canon (cf. c. 1275 *CCEO*) substantially echoes c. 1851 *CIC*/1917, but the wording is improved. In fact, the current norm makes the negative consequences described contingent on failure to prove a just impediment, not on "purgatio contumaciae," which was the case formerly. This was a not altogether linear phrase, but an effort was made, in any case, to give it hermeneutically the same meaning: "'clearing a default' consisted not only of 'declaring the default' … but also of showing that the default was involuntary in that a litigant was lawfully prevented both from appearing and from explaining his or her absence."[2]

2. J.J. GARCÍA FAÍLDE, *Nuevo derecho procesal canónico (estudio sistemático-analítico comparado)*, 2nd ed. (Salamanca 1992), pp. 108–109.

Canon 1595 § 1 (cf. c. 1275 § 1 *CCEO*) imposes on absent parties the obligation to pay expenses incurred in a case because of their absence and, if necessary, indemnify the other party if failure to appear in court cannot be satisfactorily explained with a just impediment. Paragraph 2 of this canon establishes the joint liability of both parties for judicial expenses if both fail to appear in the trial, thereby allowing the process to lapse from a common lack of interest.

CAPUT II
De interventu tertii in causa

CHAPTER II
The Intervention of a Third Party in a Case

1596 **§ 1. Is cuius interest admitti potest ad interveniendum in causa, in qualibet litis instantia, sive ut pars quae proprium ius defendit, sive accessorie ad aliquem litigantem adiuvandum.**

§ 2. Sed ut admittatur, debet ante conclusionem in causa libellum iudici exhibere, in quo breviter suum ius interveniendi demonstret.

§ 3. Qui intervenit in causa, admittendus est in eo statu in quo causa reperitur, assignato eidem brevi ac peremptorio termino ad probationes suas exhibendas, si causa ad periodum probatoriam pervenerit.

§ 1. Any person with a legitimate interest can be allowed to intervene in a case in any instance of the suit, either as a party defending his or her own right or, in an accessory role, to help one of the litigants.

§ 2. To be admitted, however, the person must, before the conclusion of the case, produce to the judge a petition which briefly establishes the right to intervene.

§ 3. A person who intervenes in a case is to be admitted at that stage which the case has reached. If the case has reached the proof stage, a brief and peremptory time-limit is to be assigned within which to bring forward proofs.

SOURCES: § 1: c. 1852 § 1; *NSRR* 160
§ 2: c. 1852 § 2; *NSRR* 117 § 1
§ 3: c. 1852 § 3

CROSS REFERENCES: cc. 1590 § 2, 1617, 1618, 1629

COMMENTARY

Luis Madero

1. *Basis for a third-party intervention*

The voluntary intervention of a third party is a typically canonical procedural institute whose origin goes back to Decretal times.[1] It arises from the mingling of procedural principles of Roman law with the broader procedural principles of Germanic law that has taken place in Church law. In the Roman process, once the *litiscontestatio* had taken place, it was unthinkable that anyone not a party to the case could become a part of the procedure, since the parties in the case were (and would remain till the end of the trial) those who initiated the case. In this respect, German procedural law was much broader and admitted anyone with an interest in the case. The purpose of this institute is clearly to offer a third party (i.e., someone who was neither petitioner nor respondent when the case began) with a protection of his or her legitimate interest that could somehow be prejudiced by the final result of the judgment.

It is true that under the principle "res iudicata inter alios, neque nocet neque prodest," a third party could avoid the effects of an *inter alios* judgment by filing a *res iudicata inter alios* exception. However, it is not always possible to file said exception, and a third party's interest could then be prejudiced and no defense would be available. For this reason, a third party that could manage to show summarially his or her interest in intervening in a case that had already been brought by the principal parties, was allowed to join the case. The institute is an illustration of the delicate respect the canonical legislator always has for situations of fact that can in any way bring about a certain harm to a person, even if that person has no properly formalized subjective right under the canonical system.

The decretalists' discussion of this institute was rather meticulous, in that they carefully distinguished the various situations that could arise. Further, they proceeded to classify the different situations that arose in practice. Certainly, there was not a very extensive doctrinal elaboration of these situations, but in practice it considerably facilitated the subsequent preparation of an entire body of doctrine on intervention.

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1. Cf. L. MADERO, *La intervención de tercero en el proceso canónico* (Pamplona 1982), especially pp. 35ff; also J.M. FERRÉ MARTÍ, *Protección procesal del tercero en el Derecho canónico* (Barcelona 1982), pp. 31ff.

2. *Types of intervention*

De Butrio[1] distinguished three types of voluntary intervention that happen to coincide with those in an area of current doctrine that have been retained to this day:

a) *Principal* intervention is the situation in which a third party intervenes in a case because he or she has a right that, in principle, excludes the right in dispute by the parties that began the case. The classical canonists called it *interventio ad excludendum* because if a third party manages to prove his or her right during the process, the other two litigants are excluded. This happens when the real holder of a right is the third party. In such cases, the judgment recognizes the third party's right in full that will be given to him or her. If said third party is unable to prove his or her right, he or she loses, and the judgment establishes that he or she did not hold the right, but rather one of the parties to the case did.

b) A *joinder* is an intervention in which a third party joins a case to defend a right, properly speaking, that is co-held by one of the original litigants. This happens in situations where the material juridical relationship at dispute in the case is a complex juridicial relationship held actively or passively. It is called a joinder because it allows a supervening joint litigant. This third party should have been summoned initially, but was not. When he or she becomes aware of the existence of the case, he or she may appear and petition the judge to admit him or her as a joint litigant with one of the parties. A joint litigant does not attempt to exclude the other two parties, but rather to join one of them to oppose the other party that is adversarial to his interests. If such a third party does not petition a joinder, the judgment would probably be prejudicial to him or her, since the judgment would modify the material juridical relationship in a way that might be contrary to his or her interest and right.

These two types of intervention may be assumed to be encompassed very well by § 1 of this canon: "sive ut pars quae proprium ius defendit," since in both types of intervention, the joint litigant is defending a right that is his/her own (and exclusively his/hers in the case of principal intervention).

c) The third type of voluntary intervention is a simple or accessory *adhesive* intervention. An adhesive intervention occurs when a third party is not directly the holder or even co-holder of a right, but only has a juridical interest in a positive outcome for one of the parties to the case. This type of intervention may be interpreted more or less broadly, depending on what is understood to constitute a legitimate interest in intervening. In some cases, a third party may have a material juridical relationship that is closely related to the relationship at dispute in the case, such that the

1. Cf. *Super II Decretalium Commentaria* (Venice 1578), p. 123.

outcome of the case might adversely affect the third party's juridical relationship. A typical example is a sublease. This is a case of a prejudicial relationship in which the judgment of a dispute affects another different one that was not at issue in the case. If this third party were not given the opportunity to be admitted to the trial, a juridical relationship he holds might be declared non-existent if the principal matter is decided in a way that is against his/her interests.

There have been cases in the canonical forum in which a third party was allowed to join even though said party's interest was not technically procedural; that is, it was not related to the object in dispute. This is the case of a third party that intervenes to make it clear that he/she has been defamed or slandered in depositions made in the case. In this case, a third party is not really intervening in the strict technical sense and is not considered a litigant. In other cases, such as an adhesive intervener, it can be seen that a third party, even though he or she may not be an autonomous party, would still be considered a litigant.

3. *Admission of a third party to the process: procedure*

a) All three types of voluntary intervention are procedurally incidental matters. In order to admit a third party as an intervenor, the third party must go to the tribunal hearing the case and file what is technically known as a *petition for joinder* before the case is concluded. This petition must be filed in writing and must explain the right that entitles this third party to intervene. In reality, in cases of principal intervention and joinder, there is a petition, in the proper sense of the term, against both litigants (*ad excludendum*) or at least one of them (joinder).

This petition must contain all information necessary to identify the case in question:

— the parties' names;

— identification of the third party; and

— grounds in fact and law establishing at least the intervenor's *fumus boni iuris*.

The judge, upon receipt of a petition for intervention, must interrupt the principle matter if he finds that *fumus boni iuris* exists and inform both parties of the contents of the petition for intervention so that they can refute it or agree with it. Informing the parties for them to be heard is inspired by c. 1514. From this canon, it can be concluded that once the terms of the dispute have been defined, any modification of the procedural relationship requires a prior hearing of the parties and consideration of their reasons. Since an incidental matter of intervention as such must be resolved by decree, the oral contentious procedure need not be followed (c. 1590 § 2), so the judge may summon the parties to appear before

the tribunal to argue their reasons for objecting to the intervention and settle the intervention issue by a decree explaining his reasons for deciding as he did (cf. c. 1617).

If a judge's decree denies intervention because the judge finds that intervention is completely devoid of grounds, there is recourse against the decision, since it is a decree that concludes the case for a third-party intervener (cf. c. 1618 with respect to c. 1629).

If the decree admits the intervention, the third party is incorporated as a new party to the case, with all rights enjoyed by the other parties. The principal matter will be decided in the final judgment.

b) The judge must give a third party an opportunity to prove allegations made in his or her petition. If the case is already in the probatory phase, a reasonable time limit must be allowed for the submission of his or her proofs.

If the case has already been published, but the concluding decree has not yet been handed down, a brief peremptory time limit in which to submit evidence may be allowed.

If the case has been concluded, the problem is more delicate, since everything is ready for the argument, and the presence of a third party can be more disruptive, since he or she would have to be given time to submit proofs. For this reason § 2 of the canon requires that intervention must take place prior to conclusion of the case.

If a third party alleges the existence of a right of his or her own, he or she must be given a procedural opportunity to prove his or her allegations broadly. In this situation, a judge must be very prudent when allowing or denying intervention. The purpose of intervention may sometimes be just to delay the case.

c) The same procedure noted above is followed for a *simple* or *accessory adhesive intervention.* It need only be pointed out that § 1 of this canon of the Code seems to deny the status as a party to the case to this type of intervener. However, such an intervenor still has procedural rights, particularly with respect to proving his or her allegations.

d) Since intervention is allowed to take place at any instance and grade of a suit, rather complicated situations may arise, especially at the second or later instances. A third party must always be given a procedural opportunity to prove his or her allegations, and at times it may be necessary to allow a special period of time for an intervener to submit proofs. Canon 1640 provides a timely solution for resolving this problem.

In any case, a judge or higher court, upon acceptance of an incidental matter of intervention, must judge it as if it were first instance. This is deduced from the spirit inspiring c. 1683 although it considers a quite different situation; both incidental matters, insofar as competence is concerned, have a certain parallelism that facilitates an analogous application (cf. c. 19).

1597 Tertium, cuius interventus videatur necessarius, iudex, auditis partibus, debet in iudicium vocare.

A third party whose intervention is seen to be necessary must be called into the case by the judge, after he has consulted the parties.

SOURCES: c. 1853; *NSRR* 118 § 1

CROSS REFERENCES: cc. 1592–1595, 1620

COMMENTARY

Luis Madero

1. Mandatory intervention of a third party is an institute different to a certain extent from voluntary intervention. Canon 1853 *CIC*/1917 distinguished two types: compulsory intervention at the petition of a party and intervention decreed ex officio by a judge (*iussu iudicis*).

a) The former—intervention at a party's petition—is currently understood to be covered by the wording of the canon on which we are commenting. When a party considers that the intervention of a third party that is not yet party to the case is necessary, this party may petition the judge in writing to summon said third party to the case. The judge will study the suitability or unsuitability of summoning said third party and notify the opposing party that the petition has been filed, so that the opposing party may present his/her reasons for objecting, if there are any. The petition of instance is a new petition introduced against the opposing party by the petitioner of compulsory third-party intervention. For that reason the other parties already in the case must be heard (cf. c. 1514).

b) Also, a judge may determine ex officio that it is necessary to call a third party that should be a party in the case. In order to do so, the judge needs also to hear the parties.

2. In both cases, there must be a certain link between the third party and the disputed juridical relationship in the case; otherwise, it would not make sense to decree this intervention. Normally, these would be cases in which a third party could have participated as a principal intervener or joint litigant. Upon being summoned to a case, a third party, logically, may appear to defend himself or herself and exercise any right to which he or she is entitled. But a third party may also waive this possibility, in which case, since intervention is compulsory and he/she is considered to be a respondent, he or she may be declared absent in the case according to cc. 1592–1595, with all the procedural consequences thereof. He or she

will be considered an absent party, and the outcome of the judgment will be binding on him or her in full. A *res judicata* will thus not be frustrated. Although it only affects the litigants (cc. 1641, 1°, 1642 § 2), this norm may at times have indirect consequences for third parties that would be affected by a final judgment that excludes them. This ex officio power to require compulsory intervention is also consistent with c. 1452 § 2, in that it grants judges special faculties to avoid unjust judgments.

3. Although nothing is expressly said in this canon, canonical doctrine has always held that compulsory intervention can only be petitioned in the first instance of a case, since—it is argued—a third party cannot be forced to renounce an instance. If a third party is really a party to the juridical material relationship at dispute in a case, a judge of first instance could not have handed down a judgment, and if he did so, it would be null and void for lack of passive legitimation. Therefore, if a judge believes that any joint litigant that should be party to a juridical procedural relationship is missing, he must summon said third party as soon as possible so as not to risk possible nullity of all the proceedings (c. 1620, 7°).

4. Compulsory intervention at one party's petition has a certain similarity to a guarantee and *laudatio* or *nominatio auctoris* also. In any case, these are juridical procedural institutes that are different from compulsory or necessary intervention.

A necessary intervener, once incorporated in the case, acquires all the procedural rights of a party. Logically, he or she should be allowed a time limit in which to submit and argue any proofs that he or she deems advisable.

TITULUS VI
De actorum publicatione, de conclusione in causa et de causae discussione

TITLE VI
The Publication of the Acts, the Conclusion of the Case and the Discussion

INTRODUCTION

Rafael Rodríguez-Ocaña

1. As part of the Code's regulation of ordinary contentious cases, title VI is devoted to three different phases of a trial: the publication of the acts, the conclusion, and the discussion. These phases close one stage of a trial and open the next, in which the judge or tribunal hands down a judgment.

In general, these final procedural phases are intended to better inform the parties about what has taken place in the trial, and on the basis of this knowledge they can prepare the defense and refute evidence submitted by the opposing party.

Judges should keep in mind that the guarantees offered to the parties in this title combine to have "the desired procedural economy serving justice without excessive delay."[1]

2. Publication of the proofs takes place by giving the parties and their advocates the opportunity to examine the acts; that is, everything that has taken place in the case, in order to gain the most complete understanding possible of anything they did not know before. Canon 1598 § 1 expressly stipulates that once the proofs have been received, the judge shall allow publication by decree.

a) Technically, the *CIC* has been more careful in regulating publication of the acts and has therefore proceeded, for example, to delete some of the formerly duplicated partial publications of proofs that were in *CIC*/1917. Of these, the most relevant was publication of testimonies, which a

1. C. DE DIEGO-LORA, commentary on title VI: *De actorum publicatione, de conclusione in causa et de causae discussione*, in *Pamplona Com.*

judge could decree upon completion of examination of all the witnesses if the parties or their advocates were not present. A judge had the option, however, of delaying partial publication until a later date (c. 1782 *CIC*/1917). In the current norms, partial publication disappeared and is subsumed in the general publication stipulated in c. 1598. For obvious practical reasons, however, the requirement of depositing presented documents with the office of the tribunal secretary has been retained, so that the opposing party can examine them (cf. c. 1820 *CIC*/1917, c. 1544 *CIC*).

The *CIC*, unlike the *CIC*/1917, has given the parties and their advocates a greater presence and participation in the instructive phase of the case, so that they can become knowledgeable of at least a good part of what has taken place and been incorporated in the case file. In spite of this, the legislator wanted to emphasize the need for a decree of publication by expressly stating that the failure to issue a decree causes nullity. This innovation should be stressed in comparison with the former legislation.

b) Regulating publication also presents other innovations that are worth mentioning. These innovations arose from the objectionable practice in certain countries where it is possible to use the acts of the canonical procedure to obtain financial benefits by filing defamation suits in civil courts to the detriment of the reputation and with personal loss of canonical judges, opposing parties, witnesses who have participated in canonical trials, etc. (see commentary on c. 1598).

The possibility of fraudulently using the acts of the canonical process led the legislator to provide measures that would prevent or at least hinder such use. To do this, the possibility of obtaining copies of the acts and documents of the case has been restricted to the advocates only (cc 1598 § 1), whereas formerly the parties could also obtain them (cc. 1858–1859 *CIC*/1917). In order to avoid the dangers mentioned above, advocates cannot give copies to parties that they technically assist.[2]

Also, in cases affecting the public good, judges are authorized to decree that a certain act not be shown to anyone to avoid the gravest dangers, provided the right to defense is safeguarded (c. 1598 § 1). This provision is an exception with respect to the general principle of publication of the acts, so the limits imposed by the legislator on the use of exceptions gain relevance.

c) A final provision about the publication of the acts is given in c. 1598 § 2. It provides that the publication gives the parties the possibility to petition the judge to admit new evidence if they believe the evidence already admitted should be supplemented. Here the legislator leaves it to

2. Cf. C. ZAGGIA, "Iter processuale di una causa matrimoniale secondo il nuovo Codice di diritto canonico," in *Il matrimonio canonico nel nuovo Codice di diritto canonico* (Padova 1984), p. 227.

the judge's discretion, as he does in other situations, to carry out the difficult task of balancing in practice the inapplicability of the principle of the preclusion of time limits, which guarantees speedy justice, with the need to discover the truth in a given case.

3. Instruction of the process is oriented to a definitive decision in a case. It is a tool that enables the parties to prove and defend their various arguments and for the judge to gain sufficient knowledge of the case. These steps, consequently, entail the need, under certain requirements, to arrive at a conclusion of the case in order to avoid excessively prolonging the case, which is almost always detrimental to the administration of justice and juridical certainty, and may favor less-than-honest efforts to further one's own interest.

From the foregoing, the unavoidable need may be deduced to close the probative phase. This seems to be the spirit underlying cc. 1599–1600, which regulate the procedural conclusive moment.

a) In the ordinary contentious process, the legislator stipulates in c. 1599 § 2 that conclusion may take place in one of three different ways and adds in § 3 of the same canon that the judge, in all three cases, must issue a decree of conclusion. On the contrary, under article 80 of the current 1994 *NSRR*, conclusion takes place *ipso iure*.

In reality, there would not have been a need for a decree in this case. One could have speeded up the proceedings by imitating the procedure used in the Rota, in which the conclusion occurs *ope legis*.

b) However, the acquisition of new proofs subsequently to the decree of conclusion is possible, and to a greater extent than was allowed under c. 1861 *CIC*/1917, thanks to new avenues available under c. 1600. This canon is clearly a practical embodiment of the inquisitive approach taken by the canonical process in its most paradigmatic expression, which is the ordinary contentious process, the point of reference for the other processes regulated by the *CIC*. Canon 1600 § 1, 3°, in fact, gives the judge the possibility of admitting any new proofs to avoid an unjust judgment, regardless of the parties' consent.

Some of the situations addressed in c. 1600 have not been well received in doctrine (see commentary on the canon) and in fact present serious difficulties for interpretation. In any case, given the extreme prudence shown by the editors of the *CIC* in regulating the possibilities for expanding the instructive phase of the process after publication of the case, it is difficult to reconcile the fact that supplementing proofs with work done by the instructor is allowed three times (cf. cc. 1598 § 2, 1600 and 1609) between publication and final judgment. These exceptions to the normal unfolding of a case should be reduced, since their excessive proliferation tends to obstruct rather than promote true justice.

Note the following example: Once the decree of publication has been handed down, the parties examine the acts and as a result of their inspection, they petition to be allowed to supplement the proofs, following the

procedures set forth under c. 1598 § 2. When this has been done, a decree of conclusion is handed down, and once again, under c. 1600 § 1, 1°, they petition the admission of proofs that had not been petitioned before. All this could take place between the two petitions in not much more time than would elapse between the first supplementary evidence and the delay in handing down a decree of conclusion.

4. The last procedural moment regulated under this title is the two forms of discussion in a case, which is an innovation with respect to *CIC*/1917: written pleadings or, in their place, oral pleadings (c. 1602 § 1).

a) Oral discussions are a specific example, but not the only one, of acceptance of an oral proceeding in a written ordinary contentious process. It has been questioned (see commentary on c. 1602) whether oral discussions are available in special processes of marriage nullity.

The legislator elected not to describe the unfolding of these two types of discussions in excessive detail. The *CIC* provides only a general framework, leaving the remainder to the regulations of the respective tribunals. This means that the legislator provides for such regulations, which can apply and determine the general precepts and also collect more particular elements respecting each place's procedural customs and formalities.[3]

b) In comparing the former regulations with current ones, it seems that the latter tends to give greater facility to written pleadings by reducing the old time limits.[4] However, facility reaches its greatest expression when discussions take place orally in the tribunal. It might also be added that the current discipline better reconciles the principle of equality of the parties, in spite of the fact that there are still vestiges of inequality favoring public parties (c. 1603 § 3).

3. Cf. J. OCHOA, "Il 'De processibus' secondo il nuovo Codice," in *La nuova legislazione canonica* (Rome 1983), pp. 375–377.
4. Cf. C. ZAGGIA, "Iter processuale...," cit., p. 231.

1598 **§ 1. Acquisitis probationibus, iudex decreto partibus et earum advocatis permittere debet, sub poena nullitatis, ut acta nondum eis nota apud tribunalis cancellariam inspiciant; quin etiam advocatis id petentibus dari potest actorum exemplar; in causis vero ad bonum publicum spectantibus iudex ad gravissima pericula evitanda aliquod actum nemini manifestandum esse decernere potest, cauto tamen ut ius defensionis semper integrum maneat.**

§ 2. Ad probationes complendas partes possunt alias iudici proponere; quibus acquisitis, si iudex necessarium duxerit, iterum est locus decreto de quo in § 1.

§ 1. When the evidence has been assembled, the judge must, under pain of nullity, by a decree permit the parties and their advocates to inspect at the tribunal office those acts which are not yet known to them. Indeed if the advocates so request, a copy of the acts can be given to them. In cases which concern the public good, however, the judge can decide that, in order to avoid very serious dangers, a given act is not to be shown to anyone. He must take care, however, that the right of defence always remains intact.

§ 2. To complete the proofs, the parties can propose others to the judge. When these have been assembled, the occasion arises anew for the decree mentioned in § 1, if the judge considers it necessary.

SOURCES: § 1: cc. 1858, 1859; *NSRR* 120; *PrM* 175 §§ 1 et 2; CPAC Rescr., 28 apr. 1970, 18
§ 2: *PrM* 175 §§ 3 et 4; CPAC Rescr., 28 apr. 1970, 18

CROSS REFERENCES: cc. 1430–1432, 1455 § 3, 1472, 1481 § 1, 1483, 1486–1487, 1548 § 2,2°, 1559, 1619, 1620,7°, 1622, 1678 § 1, 1663 § 2, 1696

COMMENTARY

Rafael Rodríguez-Ocaña

1. The canon regulates the first of the three procedural stages contained in title VI, which is called "Publication of the Acts." *Publication* should be understood here to mean the opportunity given to the parties and their advocates to examine the acts that have been assembled in the course of the proceedings. However, it does not extend any further than

this: acts are published only to the parties in the case and their legal representatives, and not anyone else.

As far as the term *acts* is concerned, in procedural terminology it may mean *acts causae* or *acta processus,* depending on whether it is related to the merit of the case and serves to define it (*acta causae*) or whether it is related to procedure, that is, the steps required by law in order for a process to move forward (*acta processus*) (c. 1472). Since the canon stipulates that a judge must allow an examination of the acts without specifying which ones, the word must be understood to refer to both *acta causae* and *acta processus,* both of which are covered by the doctrinal expression *acta iudicialia.*

The publication of the acts is therefore a stage in the process indicated by a judge through a decree to enable the parties and their advocates to examine the *acta iudicialia* in the office of the tribunal, which includes both the *acta causae* and *acta processus.* The purpose is to enable the parties to gain an overview of the instruction of the case up to this point, prior to the decree of conclusion[1] and subsequent disucssion.

2. Publication of the acts is necessary to enable the parties to exercise their right of defense. The legislator therefore requires publication under pain of nullity. However, he does say whether said nullity affects the judgment. In fact, it is not expressly included in any of the situations mentioned in cc. 1620 and 1622. In any case, the central doctrine is that, given the close connection between *ius defensionis* and publication of the acts, nullity should include the judgment itself under c. *1620,* 7°: "the *right* of defense was denied to one or other party."[2]

It should be noted that the wording of the canon allows one to ask the following question: does the connection between the publication of the acts and the right of defense lie in the act of actually gaining knowledge or in the decree, since in fact, it is illogical to issue a decree of publication as an apparent safeguard against nullity and at the same time preventing access to *personal* examination of the acts[3]? The canon takes pains to make it clear, and in my opinion, not in a superfluous way, that the decree of publication is to enable the parties and their advocates to examine the acts "which are not yet known by them." If the parties knew the entirety of the acts, it could be assumed that the absence of a decree of publication would be detached from the right of defense. Would the lack of a decree then be grounds for nullity? If so, then it would seem that c. 1620, 7° could not be invoked.

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1. Cf. S. BERLINGÒ, "Il processo," in *Diritto matrimoniale canonico* (Milan 1989), p. 260.
2. Cf. M.F. POMPEDDA, "Diritto processuale nel nuovo Codice di diritto canonico. Revisione o innovazione?", in *Ephemerides Iuris Canonici* 39 (1983), p. 223.
3. Cf. C. GULLO, "La pubblicazione degli atti e la discussione della causa," in *Il processo matrimoniale canonico,* 2nd ed. (Vatican City 1994), p. 680 and in note 9 the jurisprudence is cited.

Consequently, the norm, with respect to the decree of publication, is subject to two types of nullity: one that affects the judgment itself under c. 1620, 7°, for lack of knowledge of the acts; and the other for lack of a decree of publication, which would not affect the judgment (c. 1619) if the parties have had access at all times during the process to examine the acts in person.In the current legislation, there is no general principle of secrecy with respect to the instruction of a case[4] (c. 1678, for matrimonial cases), although the judge has the faculty to proceed in the absence of advocates when examining witnesses (c. 1559). For obvious reasons, the parties cannot be present at the examination of witnesses (c. 1559). Canon 1663 § 2 must be taken into account for the oral process.

3. The legislator authorizes the judge to provide a copy of the acts to the advocates if requested. Providing a copy is not required under pain of nullity. Whether or not to provide a copy is at the judge's discretion.

In this respect, the canon does not say whether a party electing to plead and respond in person (c. 1481 § 1) may also request a copy of the acts. The doctrine as understood is that a person is not authorized[5] to receive a copy of the acts. In the opinion of some authors, there is a clear distinction[6] between a party using the professional assistance of an advocate and a party who elects to represent himself or herself in the process.

The justification for the norm, which in its initial draft also authorized the parties to request a copy of the acts,[7] was due to the fear that they would be used to bring a penal suit against the other party or witnesses in civil courts.

The difference between parties and advocates is that advocates, to some extent, are subject to rules intended to guarantee that they will proceed in accordance with the institutionalized concept of a canonical process (c. 1483). They can be dismissed and even sanctioned (cc. 1486–1487) if they do not proceed in accordance with the institutionalized purpose. Although the parties also have their irreplaceable function within institutionalized purposes, they are nevertheless not subject to the same controls that regulate procurators and advocates.[8]

Given the manner in which providing copies is regulated by c. 1598, the only possible solutions that would avoid harming a party's right of defense, in my opinion, involve the ex officio appointment of an advocate for any party that does not have one. It might be possible perhaps, at the judge's discretion, to provide a copy of the acts to parties if the judge has guarantees that the copies will not be used for purposes other than those

4. Cf. C. DE DIEGO-LORA, commentary on 1598, in *Pamplona Com.*
5. Cf. S. GHERRO, "Sul processo matrimoniale canonico: 'pubblicazione degli atti' e dibattimento," in *Il Diritto Ecclesiastico* 105 (1994), 2, pp. 486–500.
6. Cf. ibid., p. 495.
7. Cf. *Comm.* 11 (1979), p. 134.
8. Cf. C. GULLO, "La pubblicazione degli atti...," cit., pp. 681–682.

exclusively related to the canonical case. It is true that the canon only mentions advocates, not the parties. Deletion of the parties, as has already been said, was due to the parties' possible misuse of copies. But if a judge has guarantees that the copies would be used properly, it seems that the purpose of the spirit of the norm would be fulfilled.

4. In the sense of making an examination of the *acta iudicialia* possible, publication has no limits if the trial does not involve anything that affects the public good. If the public good is affected, a judge, in order to avoid extremely serious harm, may decree that a certain act not be published and that it be kept secret from all parties, but the right of defense must be kept intact.

Before the 1981 Plenary Session, there was no such limitation in the *CIC schema* on the publication of the acts. This clause was added at the Plenary Session in light of circumstances in certain countries—the USA and Canada—where the danger exists of bringing penal suits in civil courts on the grounds of some testimony, expert report, etc., exhibited in canonical trials.[9]

Within a few years of the promulgation of the *CIC*, it was noted that "[t]his clause ... is not a contradiction, as if the right of defense were being denied in practice, which is affirmed in the invalidating clause. Not every act or document is equally essential to a trial and thus to defense. Only in the case in which the sentence is grounded on an unpublished act or document could the right of defense be said to be denied."[10]

The practical interpretation and application of this clause of the canon that limits publication of the acts has given rise to disparate positions in both doctrine and jurisprudence. The transcendence of the canon is clear because of its close connection with *ius defensionis*, and its applicability in marriage cases is of great importance. For this reason, John Paul II emphasized two principles, among other things, in his address to the Roman Rota that should serve as a set of guidelines for interpreting this norm.

Indeed, John Paul II stressed that "the right of defense, in and of itself, demands a specific opportunity to examine evidence that has been admitted, whether it originates from the other party or ex officio";[11] and "with respect to the possible said exception , it is fair to note that it would be a distortion of the norm, as well as a grave error of interpretation, if the exception became the general norm. It is therefore necessary to hold faithfully to the limits given in the canon."[12]

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9. Cf. R.J. CASTILLO LARA, "La difesa dei diritti nell'ordinamento canonico," in *Il diritto alla difesa nell'ordinamento canonico* (Vatican City 1988), p. X.
10. Ibid., p. XI.
11. JOHN PAUL II, *Address to the roman Rota,* January 26, 1989, in *AAS* 81 (1989), p. 924.
12. Ibid.

These limits or conditions for applying the clause restricting publication are:

a) *That the case concern the public good.* It is not a matter here of doing a study of which cases concern the public good, but it should be pointed out that although the area of applicability seems restrictive in principle, the vast majority of cases affect the public good in practice, given the present nature of the cases that ecclesiastical tribunals decide. This is true primarily because a very high percentage of the tribunals' work focuses on marriage nullity cases; and secondarily because at the vicarious tribunals of the Roman Pontiff, the activity of the Rota continues to be related to marriage cases, and the Signature's activity is related to contentious-administrative cases. To this must be added penal cases, including those heard by the Congregation of the Doctrine of the Faith (*PB*, 52).

b) *That given act not be shown.* This requirement implies that some proof (a document, testimony, etc.) or acts are not a large part of the instruction with respect to quantity, which is the limit the legislator is imposing here. "Aliquod actum" is vague insofar as the type of procedural act of the instruction is concerned and is at the same time a clear indication of quantity, such that s potrtion of the acts that is not to be shown must always be a limited, small portion.

c) *In order to avoid very serious dangers.* Danger may exist for the parties as well as the witnesses, experts, judges, or other officials of the tribunal and also for the Church herself. The Latin phrase used in the canon—*ad gravissima pericula evitanda*—describes exceptional danger, which is emphasized by the superlative. Danger itself must exist, not just a reservation or assumption, and the purpose of not publishing the act is to avoid it. Therefore, if the danger is unavoidable because it is going to happen anyway, it would make no sense to apply the clause.

Regarding this limit, it has been stressed that the justification for keeping a certain act secret must be an abuse, not the exercise, of a right, in cases of injustice against someone that cannot legitimately defend himself.[13] Canon 1548 § 2, 2° exempts from the obligation to respond those persons who fear that their testimony might subject them to dishonor, dangerous mistreatment, or other serious harm to themselves, their spouse, relatives, or in-laws. The basis for both norms is similar: defense of the defenseless from the abuse of a right.

d) *The right of defense must remain intact.* The first thing that must be deduced is that if no one—except the judge—knows a certain act, neither party's legitimate claims based on said act will be denied; the opposite would mean defenselessness, pure and simple. As we have seen from the supreme legislator's own words, the right of defense in and of itself *requires* the possibility of knowing the act.

13. Cf. C. GULLO, "La pubblicazione degli atti...," cit., pp. 682–683.

Consequently, the problems this clause raises arise from the importance of the act with respect to the decision of the case. If it has no such importance, it is clear that there is no problem with safeguarding the right of defense. However, if the act influences arriving at the moral certainty a judge needs to decide a case, some means must be found to safeguard the parties' *ius defensionis*.

Various solutions have been proposed:

— disregarding the act upon deciding the case. The difficulty of this approach is that if the act is of great importance, disregarding it would entail defaulting on the obligation of justice towards parties, not to mention the fact that a judgment could be handed down that might have to be amended if the act afterwards becomes known;[14]

— communicating the act to the advocates, under the obligation of secrecy(c. 1455 § 3). This is the approach to safeguarding the right of defense that is best supported by most doctrine.[15]

Before taking up § 2 of the canon, it should be emphasized, in concluding commentary on the exception to publication of some act in a case, that when the canon says that an "act is not to be shown to anyone," it should be understood in the context of safeguarding the right of defense, but also of the duty that both the promoter of justice and the defender of the bond have in cases that affect the public good. It is not possible that they would misuse anything fraudulently that would entail grave dangers for the other interventions to a case. To this it should be added that a judge should have a public party appear beforehand in order to decree the secrecy of some act and measures to be taken to safeguard the right of defense.

5. Examination of the acts may result in a petition by the parties to continue the intruction to supplement some of the proofs that have already been admitted and placed in the process. Petitions for further proofs for this purpose are allowed under § 2 of the canon. Since this is a faculty that is contrary to the principle of preclusion—publication of the acts closes the normal period of time allowed for submitting and admitting evidence— the judge should prudently weigh the need for supplementary proofs and the importance of the additional proofs petitioned, and also prevent the case from being prolonged by any unnecessary delay due to new juridical time limits that the judge would have to allow.

14. Cf. J.Mª. IGLESIAS ALTUNA, *Procesos matrimoniales canónicos* (Madrid 1991), p. 192, note 119.

15. Cf., among others, J.Mª. IGLESIAS ALTUNA, ibid.; F. DANEELS, "De iure defensionis," in *Periodica* 79 (1990), p. 257; G. ERLEBACH, "Le fattispecie di negazione del diritto di difesa causanti la nullità della sentenza secondo la giurisprudenza rotale (parte dinamica)," in *Monitor Ecclesiasticus* 115 (1990), p. 420; C. GULLO, "La pubblicazione degli atti...," cit., p. 684.

Some authors[16] believe that the wording of § 2 of the canon is not felicitous. Their reason is that it is not clear from the norm whether there is a need to acquire new proofs to proceed to publication. The phrase these authors believe leads to doubt is "if the judge considers it necessary." According to these authors, this phrase must be applied to the admission of new proofs, not publication, since publication is always necessary.

I share the opinion of these authors that the phrase can indeed be understood to refer to the proofs. However, I do not share their opinion on the second part of the issue; that is, that a decree of publication is always necessary in these cases. On the contrary, a judge may determine that a second decree of publication is not necessary because the parties have already had the opportunity to know the results of the proofs and have taken advantage of it. The parties' right of defense does not reside in the requirement for a decree of publication, but rather that they have in fact had a possibility to know the acts. The same reasoning can be applied here that the legislator used for citations. If the parties in fact appear before the judge, no citation is necessary (c. 1507 § 3). Paragraph 1 of the canon, as we have said at the beginning of this commentary, provides for the publication and examination of the acts *which are not yet known.*

The judge will therefore determine whether it is necessary to supplement the proofs and, when supplementary evidence has been admitted, he will also determine whether another decree of publication is necessary.

16. Cf. C. GULLO, "La pubblicazioni degli atti...," cit., p. 678, note 3; J.Mª. PIÑERO, *La Ley de la Iglesia,* II (Madrid 1985), p. 538.

1599 **§ 1. Expletis omnibus quae ad probationes producendas pertinent, ad conclusionem in causa devenitur.**

§ 2. Haec conclusio habetur quoties aut partes declarent se nihil aliud adducendum habere, aut utile proponendis probationibus tempus a iudice praestitutum elapsum sit, aut iudex declaret se satis instructam causam habere.

§ 3. De peracta conclusione in causa, quocumque modo ea acciderit, iudex decretum ferat.

§ 1. When everything concerned with the production of proofs has been completed, the conclusion of the case is reached.

§ 2. This conclusion occurs when the parties declare that they have nothing further to add, or when the canonical time allotted by the judge for the production of proofs has elapsed, or when the judge declares that he considers the case to be sufficiently instructed.

§ 3. By whichever way the case has come to its conclusion, the judge is to issue a decree declaring that it is concluded.

SOURCES: § 1: c. 1860 § 1; *NSRR* 121; *PrM* 176
§ 2: c. 1860 § 2; *PrM* 177 § 2
§ 3: c. 1860 § 3; *PrM* 177 § 1

CROSS REFERENCES: cc. 1459, 1465 § 2, 1481 § 1, 1518, 2°, 1593 § 1, 1596 § 2, 1598 § 2, 1600–1601, 1620, 1622, 1640, 1667, 1675 § 2

COMMENTARY

Rafael Rodríguez-Ocaña

1. This canon regulates the procedural step known as the conclusion of the case, which Roberti defined as the act that closes the instruction phase and opens the discussion of the case.[1]

In the past, the conclusion of a case was an act usually accomplished by the parties rather than the judge, and it was understood to be an act in which the parties renounced submitting any further proofs and were submitting the case for a judicial decision. This renunciation by the parties

1. Cf. F. ROBERTI, *De Processibus*, II (Rome 1926), p. 159.

could be tacit or explicit, although a tacit renunciation sufficed. This reflected the fact that the conclusion did not seem to be necessary *ad substantiam* in an ordinary case, and in fact was not necessary in a summary case.[2]

In *CIC*/1917, the conclusion of the case was already an act carried out by the judge and was done by a decree, although neither was considered necessary for the validity of the process[3] (c. 1860 *CIC*/1917).

2. The current canon on the conclusion of a case is practically the same as its above-mentioned predecessor, both as an indicator of the moment when conclusion occurs and of the various means of how conclusion may come about.

Indeed, once everything related to the production of proofs has been completed (i.e., evidence admitted up to the decree of publication), the trial reaches the new procedural moment and the conclusion of the case.

Conclusion may take place in any of three ways mentioned in the canon:

a) the parties declare they have nothing further to add;

b) the time limit stipulated by the judge for submitting additional proofs after publication has elapsed (c. 1598 § 2);

c) the judge declares the case to be satisfactorily instructed.

Regardless of how conclusion occurs, the judge issues a decree which, although it is known as a decree of conclusion, what it verifies—and this may be the principal difference between the two codes with respect to the concept of conclusion—is that conclusion has occurred, and it indicates the way in which it has occurred. It is therefore a *declarative* decree and not a *constituent* decree, so the lack of a decree of conclusion does not cause nullity.[4] For Cabreros, according to the norms in *CIC*/1917, "given the nature of the *decree*, the most proper thing is that conclusion should occur by some decree pursuant to one of the three ways by which conclusion occurs."[5]

3. Comments should be made on the three ways in which conclusion may occur:

a) A declaration by the parties that they have nothing further to add may be made spontaneously or at the judge's request.

2. Cf. ibid., pp. 158–159; F.X. WERNZ-P. VIDAL, *Ius canonicum*, VI (Rome 1927), pp. 527–528.

3. Cf. M. CABREROS, commentary on c. 1860, in *Código de Derecho Canónico y legislación complementaria* (Madrid 1974).

4. Cf. M.J. ARROBA, *Diritto processuale canonico* (Rome 1993), pp. 406–407.

5. M. CABREROS, in *Comentarios al Código de Derecho Canónico*, III (Madrid 1964), pp. 600–601.

b) The expiration of a period of time is governed by the norms on so-called judicial time limits (c. 1465 § 2), and they may be extended by a judge when there is just cause to do so after hearing both parties—if a motion for extension is ex officio—or at the request of one party. A judge cannot validly shorten this period of time without both parties' consent.

c) The third way of arriving at conclusion depends on the judge rather than the parties. It is basically intended to prevent prolonging a case by deceit or negligence. In this situation, a judge, in cases of any kind, may simply declare ex officio that the case has been satisfactorily instructed.[6] However, this declaration must respect the time limits allowed by the same judge for presenting proofs, since, as we have just pointed out, a judge cannot validly shorten it—and find that the case has been satisfactorily instructed—if the parties have not consented.

4. In the decree of conclusion, in addition to marking the conclusion of the instruction of a case and the way in which conclusion has occurred, a judge will also be able to stipulate a time limit in which the parties must present their defense or allegations (c. 1601). The decree must be notified to all parties *in causa*.

5. The principal effects of conclusion may be summarized as follows:

a) Preclusion of new proofs. Although this is a general effect of conclusion, in practice the legislator does admit new proofs if certain requirements are met (see commentary on c. 1600).

b) The principle of preclusion also affects the examination of witnesses, and equally the application of the exceptions and requirements set forth under c. 1600.

c) A third-party's petition to join a case is not admitted once the conclusion of the case has occurred (see commentary on c. 1596 § 2).

d) If after the conclusion of a case one of the parties dies, changes status or no longer has the capacity in which said party is appearing, the judge will not interrupt the proceeding. On the contrary, he will proceed it by citing the procurator, and if there is no prosecutor because a party was representing himself or herself (c. 1481 § 1), the judge cites the heir of the deceased person or his or her successor (cc. 1518, 2° and c. 1675 § 2).

These last two effects follow because upon conclusion all the elements necessary to decide a case have been entered therein.[7]

e) The discussion phase of the case now begins.

6. However, conclusion, as a preclusive act, does not affect a proposition to find defects that are grounds for nullity of the judgment, which can be made ex officio or as an exception at *any phase* of a case (c. 1459).

6. Cf. F.X. WERNZ-P. VIDAL, *Ius canonicum*, cit., p. 527.
7. Cf. F. ROBERTI, *De processibus*, cit., p. 161.

This is the case, for example, with exceptions for absolute incompetence and defects of nullity pursuant to cc. 1620 and 1622.

Nor does the conclusion affect the preclusion of the appearance of the respondent declared absent in a case (c. 1592). If he or she decides to appear or reply, he or she may do so prior to the decision in the case and therefore subsequent to conclusion and enjoy the opportunity—granted by the legislator—to submit conclusions and proofs (see commentary on c. 1593 § 1). In any case, a judge must take care to ensure that the trial is not unnecessarily delayed.

7. The conclusion of a case, as a procedural act, is not required at the appellate level. In an appeal, unless evidence must be supplemented, once the issue has been joined, the case proceeds immediately to its discussion (see commentary on c. 1640). Neither is there conclusion of a case in an oral contentious process, where the case proceeds to oral discussion at the same hearing once the proofs have been gathered (see commentary on c. 1667). It follows from this that conclusion is not necessary, as was the case in the former canonical summary process.[8]

8. Cf. ibid., p. 158.

1600 **§ 1. Post conclusionem in causa iudex potest adhuc eosdem testes vel alios vocare aut alias probationes, quae antea non fuerint petitae, disponere tantummodo:**

1° in causis, in quibus agitur de solo privato partium bono, si omnes partes consentiant;

2° in ceteris causis, auditis partibus et dummodo gravis exstet ratio itemque quodlibet fraudis vel subornationis periculum removeatur;

3° in omnibus causis, quoties verisimile est, nisi probatio nova admittatur, sententiam iniustam futuram esse propter rationes, de quibus in can. 1645 § 2, nos. 1–3.

§ 2. Potest autem iudex iubere vel admittere ut exhibeatur documentum, quod forte antea sine culpa eius cuius interest, exhiberi non potuit.

§ 3. Novae probationes publicentur, servato can. 1598 § 1.

§ 1. Only in the following situations can the judge, after the conclusion of the case, still recall earlier witnesses or call new ones, or make provision for other proofs not previously requested:

1° in cases in which only the private good of the parties is involved, if all the parties agree;

2° in other cases, provided that the parties have been consulted, that a grave reason exists, and that all danger of fraud or subornation is removed;

3° in all cases, whenever it is probable that, unless new proof is admitted, the judgement will be unjust for any of the reasons mentioned in Can. 1645 § 2 nos. 1–3.

§ 2. The judge can, however, order or admit the presentation of a document which, without fault of the interested party, could not perhaps be presented earlier.

§ 3. New proofs are to be published according to Can. 1598 § 1.

SOURCES: § 1: c. 1861 § 1; *NSRR* 121; *PrM* 178 § 1
§ 2: c. 1861 § 1; *NSRR* 121; *PrM* 178 § 1
§ 3: c. 1861 § 2; *NSRR* 121; *PrM* 178 § 3

CROSS REFERENCES: cc. 1452 § 2, 1593 § 2, 1598–1599, 1609 § 5, 1639 § 2, 1645 § 2, 1°–3°, 1665

COMMENTARY

Rafael Rodríguez-Ocaña

1. Under *CIC*/1917, no new proofs could be admitted after the conclusion of the case (c. 1861 § 1). However, there were exceptions to the general principle of prohibition that arose from concordance among several norms scattered through the Pio-Benedictine legal text, which consequently resulted in a poor systematic regulation that was even less articulated. Canon 1861 § 1 already gave three exceptions to the principle of prohibition and provisions set forth in cc. 1610 § 2 and 1786 for cases of public interest should be added to these, and in marriage nullity processes, beginning with *PrM* 178, the exception almost became a general principle: "even after conclusion of the case, new proofs are admitted in these cases."[1]

2. From the procedural point of view, the current canon more technically regulates the possibility of a new, but limited, instruction after a decree of conclusion has been issued in a case (c. 1599).

In the current norms, canonical doctrine[2] finds it easier to extend the instruction of a case subsequent to the conclusion, which is justified by the specifics of the canonical process in seeking *cognitio veri* and equity, which the judge is to consider in everything he does, and also procedural economy, although this may seem contradictory, since the likelihood of an appeal after incomplete instruction of a process would delay a final decision in the case.[3]

The regulation given in the current canon is inspired by the general principles given by the legislator to guide canonical judges' initiatives. These principles have to do with the nature of the object of the process (public or private) and the inherent justice of a judicial decision, without limiting probative means presented ex officio by the judge (see commentary c. 1452).

3. Under the principles mentioned above, the criteria governing possible additional proofs are as follows:

a) In cases that affect the private good only, instruction may be extended if all parties *in causa* agree. In these cases, the legislator respects the dispositive principle, since the matter is of interest to private parties

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1. Cf., for this subject matter in the *CIC*/1917, M. CABREROS, in *Comentarios al Código de Derecho Canónico*, III (Madrid 1964), p. 601.
2. Cf. C. ZAGGIA, "Iter processuale di una causa matrimoniale secondo il nuovo Codice di diritto canonico," in *Il matrimonio nel nuovo Codice di diritto canonico* (Padova 1984), p. 229.
3. Cf. J.Mª. SERRA, commentary on c. 1600, in *Commento al Codice di diritto canonico* (Rome 1985).

only. In any case, the agreement of the will of the parties is of no consequence, even in private matters, if the judge discovers the danger of fraud in the use of this faculty, which remains an exception granted by the legislator with the preclusion arising from conclusion of a case.

b) In cases that affect the public good—and not just cases concerning the status of persons—new instruction of the proofs may be admitted after hearing both parties if there is a grave reason, so long as the dangers of fraud, subornation, and corruption are avoided. The legislator demands three requirements here, and all three must occur *simultaneously*: a grave reason for admitting new proofs, hearing both public and private parties, and avoiding the dangers mentioned above.

It is logical that the possibility of fraud should be expressly mentioned, since once the acts have been published and any additional proofs have been submitted under c. 1598 § 2, the parties have a more or less clear perspective on the probable success of their allegations against the other party. It is then possible that the party that is less likely to prevail may proceed to exhibit obstructionist activity in order to prolong the case unnecessarily and look for other ways out that are more favorable to his or her personal interest.[4]

c) Finally, in all cases, a judge may admit new proofs, either at one party's petition or ex officio (c. 1452), when it is likely that the failure to do so would render the judgment unjust for the following reasons:

— because the judgment was grounded on proofs that are later shown to be false and it was precisely this proof that swayed the judicial judgment (c. 1645 § 2, no. 1);

— because new documents that prove new facts that had hitherto been unknown have appeared that are of such persuasive evidence that it would be necessary to issue a new judgment overturning an earlier judgment if the process is to serve truth and justice (c. 1645 § 2, no. 2);

— and finally, because one of the parties may have proceeded fraudulently to sway the judgment in his or her favor to the detriment of the other party who is unaware of the fraud (c. 1645 § 2, no. 3).[5]

In this third case, with great sensitivity to fairness, it is a matter "of encouraging judges to take every possible initiative to safeguard not so much the formal aspects as the substantive aspects of the search for the truth."[6] In spite of this, there has been no lack of criticism and questions

4. Cf. C. GULLO, "La pubblicazione degli atti e la discussione della causa," in *Il processo matrimoniale canonico*, 2ª ed. (Vatican City 1994), p. 686.
5. Cf., for the three requirements, C. DE DIEGO-LORA, commentary on c. 1645, in *Pamplona Com.*
6. C. ZAGGIA, "Iter processuale...," cit., p. 229.

from some authors about the practical feasibility of the norm.[7] The following insights may provide a provisional solution to the difficulties that have been pointed out.

At first sight, it would seem that the purpose of the reference to c. 1645 § 2, 1°–3° is to anticipate a possible *restitutio in integrum* against a judgment that turns out to be unjust. This is a recourse that would be filed, within three months of learning the reasons (c. 1646 § 1), before the judge who handed down the judgment. However, extraordinary recourse is provided for only against judgments that have become an adjudged matter (c. 1645 § 1), a consequence that can occur only in the situations listed in c. 1641. It should therefore be concluded that only in those cases is it possible to speak properly of anticipation in order to avoid a *restitutio* intervention. All of these factors lead one to think that it is possible to introduce new proofs under c. 1600 § 1, 3°, in an appeal, as noted—"new proofs are admitted only in accordance with can. 1600," says c. 1639 § 2[8]—and in the first instance also when a definitive judgment has been handed down that cannot be appealed. This is because a judgment handed down in such cases may become a *res iudicata*, which is a prerequisite for petitioning for *restitutio*.

In the other cases ending in a judgment that is not subject to an extraordinary *restitutio in integrum* recourse because the case has not become an adjudged matter, supplementary instruction is intended not so much to avoid any possible future *restitutio*—since the case would still have to proceed to a new instance—as to authorize and even proceed ex officio when there are grave reasons, or when a judge believes that his judgment, if handed down as instructed in the case, would be gravely unjust (c. 1452 § 2). In any case, care should be taken to prevent any danger of fraud or subornation.

4. The extension of instruction authorized by a judge in accordance with the requirements and conditions given under § 1 of the canon is not limited to any specific type of proof. Therefore the same witnesses may be re-examined or new witnesses may be called. New proofs that had not been requested earlier may also be admitted, and the legislator does not exclude anything regulated in the *CIC* (declarations by the parties, documentary evidence, testimony, opinions of an expert, judicial acknowledgment, etc.).

In addition to these, although strictly speaking it may not be considered an extension of the instruction, a judge may allow the submission of a document that could not be admitted into the process prior to conclusion

7. Cf. J.J. GARCÍA FAÍLDE, "Una primera lectura del nuevo Código de derecho procesal canónico," in *Revista Española de Derecho Canónico* 39 (1983), p. 155; J. ACEBAL, commentary on c. 1600, in *Salamanca Com.*

8. Cf. C. GULLO, "La pubblicazione degli atti...," cit., p. 686.

of the case, if it was not the fault of the interested party. It seems that the legislator makes it easier to admit documents than other proofs.

5. New evidence must be published in accordance with c. 1598 § 1. Indeed, once new proofs that have been introduced are incorporated in the process, including also documents that could not be submitted when they should have been admitted, the judge will issue a decree of publication, which allows the parties and their advocates to examine the acts containing the proofs of which the parties are unaware.

The canon refers only to c. 1598 § 1 and not to § 2. This may be interpreted as a limit on requests for another extension of instruction under this norm. This seems logical, since instruction cannot be extended indefinitely.

The new decree of publication must set a time limit for deductions, and subsequently a decree of conclusion must be issued because the time limit has expired, or because the parties have nothing further to add or because the judge considers the extension satisfactorily instructed (c. 1599 § 2).

6. Is it possible in these cases that a decree of publication and a decree of conclusion could be issued at the same time, since instruction is being extended when the conclusion of the case has already been declared?

Opinions differ. For Iglesias Altuna, new proofs must be published and another time limit for deductions must be allowed, "unless the judge considers the case satisfactorily instructed, in which case the new decree of publication and the new decree of conclusion would be issued simultaneously (cf. c. 1599) or both publication and conclusion would be declared in the same decree, which comes down to the same thing."[9]

On the other hand, for Gullo, it would be *ilicit* to issue both decrees simultaneously. He states this with respect to a Rota judgment *coram* Burke—representing a third opinion on this matter—who is inclined to argue that the judgment would be null and void, because the simultaneity of the two decrees both deprives a party of the possibility of completing proofs and prevents the party from arguing his or her own defense.[10]

In my opinion and in line with this commentary (see also the commentary on c. 1598), the normal procedure would be to issue the two decrees separately even if it is a case of the proofs being supplemented after the conclusion of the case has been declared for the first time. The fact that there is no time limit for the parties to produce additional proofs does not seem to be grounds for nullity, since, as Gullo points out, strictly speaking, the discussion phase of the case begins after the decree of

9. J.Mª. IGLESIAS ALTUNA, *Procesos matrimoniales canónicos* (Madrid 1991), p. 193.
10. Cf. C. GULLO, "La pubblicazione degli atti...," cit., p. 687, note 25.

conclusion is issued, in which the parties will make such statements as they deem advisable.[11] And this should be particularly taken into account here, since, as we have already noted, c. 1600 § 3 does not refer to c. 1598 § 2, which regulates the opportunity of supplementing proofs after the publication of the acts. Proofs introduced after the conclusion must be published—under pain of nullity—but it does not seem that the legislator grants a new opportunity to extend the instruction once again after that publication, with the exception of the case mentioned in c. 1609 § 5. The most important thing for validity is that the decree of publication allow a time limit for the parties to examine the acts that they do not know yet. The judge *cannot validly shorten* this time limit without the parties' consent (c. 1465 § 2). Only then can a judge issue a new decree of conclusion.

7. The norm given in c. 1600 is mentioned five times in the entire *CIC*.

a) It is first mentioned in c. 1452 § 2. This norm traces the basic principles governing the actions of the judge, depending on the public or private nature of the object of the case. More specifically, the legislator points out that the possibility of the judge, in order to avoid a gravely unjust decision, and without prejudice to the provisions of c. 1600, may supplement the parties' negligence. Canon 1452 § 2 is a norm that virtually legitimizes a judge's initiative in the canonical process, which is based on the peculiarity of *cognitio veri* that Church justice claims. The situations given in c. 1600 are a practical application of c. 1452 § 2 to the specific case of extending the instruction in a case that has been concluded.

b) The legislator also refers to c. 1600 to prescribe that if a respondent appears in a case after having been declared absent, said respondent can introduce proposed findings and proofs, which do not hinder the conclusion of the case while allowing the submission of additional evidence under c. 1600 (c. 1593 § 2).

c) A third reference is seen in the description of the internal procedure that a collegial tribunal must follow until the conclusion of a judgment that decides the principal matter (c. 1609). Specifically, if the judges cannot or do not wish to hand down a judgment because they believe the instruction of the case should be completed, instruction must be extended in accordance with c. 1600. Doctrine makes the following exception here: in such situations, it does not seem that § 3 of c. 1600 is applicable, since it could excessively prolong the process[12] (see the commentary on c. 1609).

d) The legislator also uses c. 1600 to prescribe that the admission of new proofs at the appellate level is only allowed in accordance with the provisions of this canon (c. 1639 § 2). Proofs introduced in the first

11. Cf. ibid.
12. Cf. C. DE DIEGO-LORA, commentary on c. 1609, in *Pamplona Com.*

instance retain their weight in an appeal and therefore do not need to be re-introduced.

e) Finally, in an oral contentious proceeding, even though there is no conclusion of the case, the *CIC* refers to c. 1600 to prescribe that the provisions set forth in this canon are the ones that the judge is to follow in ordering new proofs, once a hearing has been held, even if only a single witness has been heard (see commentary on c. 1665).

1601 **Facta conclusione in causa, iudex congruum temporis spatium praestituat ad defensiones vel animadversiones exhibendas.**

When the case has been concluded, the judge is to determine a suitable period of time for the presentation of pleadings and observations.

SOURCES: c. 1862; *PrM* 179 § 1

CROSS REFERENCES: cc. 201 § 2, 1432, 1453, 1463, 1465 § 2, 1602–1603, 1606

COMMENTARY

Rafael Rodríguez-Ocaña

1. When the case has been concluded (c. 1599 § 3), the judge is to determine a suitable time limit for the parties to present their pleadings and observations.

This prescription begins the third of the phases mentioned in title VI of this part of the *CIC*. It is the so-called discussion phase of the case, defined by doctrine as a "recapitulation and assessment of the evidence made by the parties or their representatives, to persuade the judge of their rights and to refute arguments made by the other party.[1]" The purpose therefore is to organize in a consistent and systematic way material that is scattered in the acts and to offer the judge their own assessment which, when compared with the assessments of the other party and the public minister—promoter of justice or defender of the bond, if they have intervened in the case—would lead the judge to the moral certainty necessary to decide the case (c. 1608 §§ 1 and 2). From this we may deduce an essential feature of discussion of the case: its adversarial form.

2. The canon mentions pleadings (*defensiones*) and observations (*animadversiones*). *Pleadings* or also *restrictus* is the name given to the petitioner's brief, in which the petitioner supports—defends—his or her own allegations and petitions the judge to decide in his or her favor. In civil courts, these pleadings are called "closing brief" or "closing argument.[2]" On the other hand, the *observations* are the respondent's brief, in which he or she affirms his or her position and tries to discredit the

1. M. CABREROS, in *Comentarios al Código de Derecho canónico*, III (Madrid 1964), p. 602.
2. Cf. ibid.

petitioner's arguments. If during the process the respondent's counterclaim is admitted, the roles of petitioner and *pars conventa* are reversed. In effect, in a counterclaim the respondent becomes a petitioner and he or she submits pleadings, while the petitioner becomes a respondent and his or her replies are given in the observations (see commentary on c. 1463). Both briefs may be written by the parties' advocates.

If a public party intervenes in the process, the brief filed by the defender of the bond in this phase of the case is called an *animadversiones* or *observations*, in which he or she "is bound ... to present and expound all that can reasonably be argued against the nullity or dissolution" (c. 1432). Arguments made by the promoter of justice are set down in the so-called *pro rei veritate* plea.

The next canon, c. 1602, should be taken into account in interpreting this norm: it says that pleadings and observations are normally submitted in writing, but with the parties' consent a judge may consider an oral discussion sufficient, which means that each party's arguments would be made before the tribunal orally.

3. The canon establishes that judges allow a suitable time limit for submitting pleadings and observations. The purpose of this time limit is the submission of said documents to the chancery, if the judge has elected to hold discussion by exchanging pleadings and observations (c. 1603). On the other hand, if the judge decides that discussion will be done orally before the tribunal, he must also allow a suitable time limit to enable each party to prepare his or her oral arguments.

From the text of the canon, it can be inferred that the time limit allowed by a judge is of a judicial nature, although it is not specified whether it is peremptory—according to doctrine, judges may also set this type of time limit[3]—or conventional. In principle, we should understand that it falls under the category of judicial time limits that are generally extendable by a judge for a just cause. Extensions may be granted ex officio or upon request by the parties. If ex officio, the judge must hear the parties to determine whether they have anything to say. If a petition for extension was made by one of the parties, the judge must hear the other parties before extending the time limit. These judicial time limits may be shortened, but in that case the judge must have the parties' *consent* in order for a shorter time limit to be valid (see commentary on c. 1465 § 2).

The peremptory effect of this time limit for presenting pleadings and observations becomes clear by virtue of the fact that, under c. 1606, if pleadings and observations are not deposited with the chancery prior to or at the expiration of the time limit allowed by the judge, he may proceed to hand down the judgment under the conditions prescribed in c. 1606. This canon adds supplementary information on the nature of the time

3. Cf. L. DEL AMO, commentary on c. 1465, in *Pamplona Com.*

limit by expressly mentioning that it is *useful* time. It is therefore counted in days, but it does not run when one is unaware, or when one is unable to respond (see commentary on c. 201 § 2).

Private parties may renounce the time limit for presenting pleadings and observations; public parties, whose observations are required (c. 1606), may not. Private parties may also defer, in the customary way, to the "knowledge and conscience of the judge" (c. 1606).

4. The criterion on extending a useful time for depositing pleadings and observations is not determined by the legislator. The canon only says that it must be a *suitable* time, but it does not expressly say what factors must be considered to determine suitability, nor does it specify a given period of time. The question is important, since recent doctrine links the need to allow suitable time with the exercise of *ius defensionis* by the parties *in causa.*[4]

In the context of the *CIC*/1917, it was sensibly maintained that the criterion for setting the time limit should be inferred from the nature of the case and its particular difficulty, the amount and difficulty of proofs introduced, and also other circumstances related to time and persons.[5] Roberti's "necessitas sollicitae decisionis"[6] may also be added to these criteria.

Consequently, setting the time limit depends on no small number of factors that a judge must consider and prudently weigh in the light of c. 1453. In any case, it is the parties' right to have a suitable time to present their pleadings or observations, and "denying the parties an opportunity to do so would be tantamount to denying them the opportunity to exercise their right of self-defense.[7]" There are judgments of both the Signature and the Roman Rota that do not recognize harm to the right of defense in certain cases when there was no suitable time limit. Thus, a decision by the Signature congress ruled that there was no harm to *ius defensionis* in spite of the fact that the petitioner did not have the minimum time in which to present his arguments if the appeal tribunal limited itself to upholding the execution of a judgment of the first instance; and a Rotal judgment recognized curable nullity only for a party that had not been allowed a suitable time to examine proofs and present his or her observations, if the proof was obtained subsequent to the conclusion of the case.[8]

4. Cf. C. GULLO, "Il diritto di difesa nelle varie fasi del processo matrimoniale," in *Il diritto alla difesa nell'ordinamento canonico* (Vatican City 1988), p. 44.
5. Cf. F.X. WERNZ-P. VIDAL, *Ius Canonicum*, VI (Rome 1927), p. 529.
6. Cf. F. ROBERTI, *De processibus*, II (Rome 1926), p. 164.
7. J.J. GARCÍA FAÍLDE, *Nuevo Derecho procesal canónico* (Salamanca 1984), p. 165.
8. Cf. Signatura, *Lausannen. Geneven.*, November 11, 1981; c. PINTO, January 13, 1984, no. 9, both decisions cited by C. GULLO, "Il diritto di difesa...," cit., p. 44, note 39.

Regarding specific proposals for the definition of a suitable time, Gullo[9] maintains that it would harm a party's right of defense if a judge allowed less than ten days. It should be emphasized that this proposal was made for marriage nullity cases, not for all types of contentious cases.

The current *NSRR* maintains a time limit of 40 days for the defender of the bond to present his observations (*NSRR* 83 § 2), but no specific time limit is given for the parties to present their pleadings or observations. However, in clear contrast, they do determine the time that should be allowed for *responsiones* (replies), which may be extended for legal representatives up to twelve days prior to resolution of a principal or incidental matter, and may be reduced to six days for *pro vinculo* writs (*NSRR* 83 § 3).

5. Canon 1601 says nothing about how a judge is to determine a suitable time for presenting pleadings and observations. There are various possibilities. The time may be stipulated in the decree of conclusion of a case—this would not be possible in the Roman Rota, since conclusion occurs *ipso iure* under *NSRR* 80—or in another subsequent decree[10] if proofs were supplemented in accordance with the requirements given in c. 1600.

It is also maintained that no *ad hoc* decree is necessary to set a useful time, because the objective existence of a suitable period of time for the parties to present pleadings and observations—if they wish to do so—between notification of conclusion of the case and judgment suffices.[11] However, this option could be in practice an opportunity for a certain disorder, in addition to the fact that it does not give the parties assurance.

Finally, others believe that nothing prevents a single decree from stating three things: publication of the case, the term of conclusion and when discussion will begin, "this is how the time limit for examination of the acts is given, as well as the time limit for preparing and presenting pleadings or observations.[12]

See commentary on c. 1600 about the difficulty involved in some of these possibilities, particularly combining the decrees of publication and conclusion. It seems that the most plausible solution to the difficulties mentioned here is to set a canonical time limit in an *ad hoc* decree rather than in the decree of conclusion, although in fact what is most important procedurally is that there be suitable time for presenting pleadings.

9. Cf. C. GULLO, "La pubblicazione degli atti e la discussione della causa," in *Il processo matrimoniale canonico*, 2nd ed. (Vatican City 1994), p. 691.
10. Cf. F. ROBERTI, *De processibus*, cit., p. 164.
11. Cf. C. GULLO, "Il diritto di difesa...," cit., p. 44.
12. J.Mª. PIÑERO, *La ley de la Iglesia*, II (Madrid 1985), p. 539.

1602 **§ 1. Defensiones et animadversiones scriptae sint, nisi disputationem pro tribunali sedente iudex, consentientibus partibus, satis esse censeat.**

§ 2. Si defensiones cum praecipuis documentis typis imprimantur, praevia iudicis licentia requiritur, salva secreti obligatione, si qua sit.

§ 3. Quoad extensionem defensionum, numerum exemplarium, aliaque huiusmodi adiuncta, servetur ordinatio tribunalis.

§ 1. Pleadings and observations are to be in writing unless the judge, with the consent of the parties, considers it sufficient to have a discussion before the tribunal in session.

§ 2. If the pleadings and the principal documents are to be printed, the prior permission of the judge is required, and the obligation of secrecy, where it exists, is still to be observed.

§ 3. The directions of the tribunal are to be observed in questions concerning the length of the pleadings, the number of copies and other similar matters.

SOURCES: § 1: c. 1863 § 1; *PrM* 179 § 2
§ 2: c. 1863 §§ 3 et 4; *NSRR* 122 § 1, 125 § 1; *PrM* 179 § 3
§ 3: cc. 1863 §§ 1 et 2, 1864; *NSRR* 124, 126 § 1; *PrM* 179 § 2, 182

CROSS REFERENCES: cc. 127 § 2, 2°, 1455 § 3, 1598 § 1, 1604 § 2, 1605, 1611–1612

COMMENTARY

Rafael Rodríguez-Ocaña

1. This canon regulates two matters: the permissible ways of holding the discussion of a case; and the printing, length, number of copies, etc., of pleadings and observations. These matters were covered in *CIC*/1917 under cc. 1863 and 1864 and in *PrM* under articles 179, 182 and 184.

2. Paragraph 1 of the canon prescribes that the discussion of the case may be either in writing—which is the most common way of proceeding with the discussion[1]—or orally, if the judge considers it sufficient and has

1. The oral discussion was not allowed to become the general rule, cf. *Comm.* 11 (1979), p. 137.

the parties' consent. This canon introduces an important change over the former law, under which the discussion of the case was always done in writing and could only be supplemented afterward in a moderate oral discussion (cc. 1863 § 1 and 1866 §§ 2–4 *CIC*/1917). Now there are three ways to conduct a discussion: written discussion; oral discussion instead of written; and written discussion supplemented with moderate oral discussion[2] (see commentary on c. 1604 § 2).

3. *Written discussion.* This is the most common procedure. The parties or their advocates prepare written pleadings and observations. If public parties intervene, the defender of the bond will submit a timely *animadversiones* or observations, and the promoter of justice will submit a *voto pro rei veritate.*

a) The criteria for preparing pleadings and observations given by the *CIC*/1917 commentators—including Roberti, among others—remain valid: "Defensio, praemissa brevi facti specie, exponit elementa facti et probationes quibus factum consistit, et illustrat normam iuridicam quae facto applicanda censetur; concluditur legis executionem in casu concreto invocando.[3]" The format of these briefs is therefore similar to the format used in decisions[4] (see commentary on cc. 1611 and 1612), although everything supporting one party's proper right is emphasized and everything against that party's proper right is explained away. It is essential, in any case, that pleadings and observations clearly refer to the acts of the case, which implies in turn that the parties and their advocates may enjoy access to the acts and if necessary, request any necessary copies (see commentary on c. 1598 § 1).

b) Pleadings, including the principal documents of the acts of the case, may be copied if the judge's permission is obtained. In the earlier law (c. 1863 § 3 *CIC*/1917), documents were printed only if it was not an excessive burden on the parties.

Two sections are printed together. The pleadings of the public and private parties are printed in one part, and the summary of the acts together with the more important documents are printed in the other part. The second part may contain, for example, the petitioner's petition, the interrogatory, the parties' and witnesses' responses, documents, expert testimony, etc. The resulting folder is labeled with the case number and the parties' names; it must also contain an index, and the pages must be numbered.

The word *printed* as used in the canon does not necessarily imply any particular kind of reproduction. Judges, if they consider the criteria mentioned above—that there be no excessive burden on the parties—are

2. Cf. M.F. POMPEDDA, "Diritto processuale nel nuovo Codice di diritto canonico. Revisione o innovazione?", in *Ephemerides Iuris Canonici* 39 (1983), p. 224.
3. F. ROBERTI, *De Processibus*, II (Rome 1926), pp. 162–163.
4. Cf. M.J. ARROBA, *Diritto processuale canonico* (Rome 1993), p. 413.

to choose a reproduction method that is appropriate and economically reasonable. The use of computers nowadays in tribunals offers a number of fast, economic options for this purpose.

c) Printing the pleadings, case summary, and relevant documents does not necessarily equate to *publishing* items that are printed. Judges may require both the parties and their advocates to maintain secrecy. This rule must be understood in conjunction with c. 1455. Although §§ 1 and 2 of this canon directly impose the obligation of secrecy on members of the tribunal, they also expressly impose this obligation, by extension, on other persons, such as: the parties, their advocates or procurators, and witnesses and experts, on the grounds of the danger to others' reputation that might arise from disclosure of the acts or evidence, or that it might cause ill will, scandals, or similar difficulties (see commentary on c. 1455 § 3).

d) Regarding the length of the pleadings, number of copies, and other similar matters, the canon defers their regulation to the rules of the tribunal. This deference also includes the length of the observations of the defender of the bond and the *votum pro rei veritate* of the promoter of justice. From the general expression "aliaque huiusmodi adiuncta" used in the canon, it seems that the rules of the tribunal may also govern such other matters as the structure of oral arguments mentioned in cc. 1602 § 1 and 1604 § 2; the period of time to be allowed for presenting the pleadings and written reports by public parties; the time limits for replying (c. 1603 § 1); circumstances requiring secrecy; etc.[5] If there are no such norms, competence to determine all these matters devolves directly upon the judge hearing the case.

Excessively lengthy records with overabundant "verbose scientific discussions and unnecessary irrelevant quotations"[6] have never been well received, either by ecclesiastical tribunals or doctrine.[7] Above all, the preference is for seriousness and concise exposition, based on solid arguments and technical rigor rather than the number of pages. The limit of 20 pages for pleadings and 10 pages for replies set in *PrM* 182, may serve as general guidelines. Article 82 of the current *NSRR* says, "excedere non debent paginarum numerum more admissum." The custom is for the pleadings not to exceed 20 pages and replies not to exceed 10 pages, as stated in *PrM*.

e) The procedures for written discussion are regulated by c. 1603 (see commentary).

4. *Oral discussion.* The canon allows oral discussion of the case instead of written. Oral discussion should not be confused with "moderate

5. Cf. C. ZAGGIA, "Iter processuale di una causa matrimoniale secondo il nuovo Codice di diritto canonico," in *Il matrimonio nel nuovo Codice di diritto canonico* (Padova 1984), p. 232.
6. J.Mª. PIÑERO, *La Ley de la Iglesia*, II (Madrid 1985), p. 540.
7. Cf. F. ROBERTI, *De Processibus*, cit., p. 163; C. ZAGGIA, "Iter processuale...," cit., p. 230.

oral discussion"—set forth under c. 1604 § 2—which complements the prior written discussion.

a) Paragraph 1 of the canon sets the following conditions for oral discussion of a case: that the parties consent and that the judge consider it sufficient.

Regarding the first requirement, it is to be noted that the judge's initiative in this case is limited by the dispositive principle: it is not sufficient that the judge consider it sufficient. The *consent* of both public and private parties is necessary, not merely consultation. This means that a judge's decree ordering oral discussion is invalid under c. 127 § 2, 2°, if the parties' consent has not been requested beforehand or if oral discussion is against the will of any or all of the parties. From the interplay of these two canons, it can be inferred that consent must be obtained from all parties *in causa*. The nullity of this decree does not seem to entail nullity of the judgment on the grounds of denial of the right of defense (c. 1620, no. 7), since the issuance of the decree, even though it may be issued without their consent, does not deprive them of the discussion of the case. The discussion takes place, albeit illicitly insofar as the method ordered by the judge is concerned, but this does not affect the validity of the judgment.

Although a certain author seems to maintain otherwise,[8] the norm does not set express limits with respect to the object of the process, greater or lesser difficulty of the case, whether or not the public or private good is affected by the case, the importance of the cause, etc. However, substituting oral discussion instead of written in the procedure for declaring marriage nullity cases has raised doubts and even denials that it can be substituted at all. This opinion maintains that oral discussion is a characteristic and not a key note of the oral contentious process, whose use is prohibited in marriage nullity cases (c. 1690).[9] The reasoning is not altogether convincing:

— In the first place, the norm authorizing oral discussion is a precept that is systematically inserted in the ordinary contentious processes. The legislator uses it to try to expedite the procedure with certain acts inspired by the oral principle. These acts, therefore, belong to ordinary contentious processes and can be extendable, under the norms regulating them, provided the case utilizes the process.

— In the second place, the force of the oral principle in some acts in ordinary contentious process (cf. cc. 1503, 1513 § 2) or the written principle in oral process (cf. cc. 1658 § 1, 1659 § 1, 1661 § 2) does not imply that

8. Cf. M.J. ARROBA, commentary on c. 1602, in A. BENLLOCH (Ed.), *Código de Derecho Canónico* (Valencia 1993); of a different opinion is J.M^a^. SERRA, commentary on c. 1600, in *Commento al Codice di diritto canonico* (Rome 1985), p. 913.

9. Cf. I. GORDON, *Novus processus nullitatis matrimonii. Iter cum adnotationibus* (Rome 1983), p. 36; apparently of the same opinion is J.J. GARCÍA FAÍLDE, *Nuevo Derecho procesal canónico* (Salamanca 1984), p. 165.

these processes are substantially changed, since the procedural principles at the root of the configuration of each type of process remain the same for the majority of acts.

— In the third place, it does not seem correct to consider this type of oral discussion, where there are no proofs, to be the procedural act or phase that is most characteristic of the oral process. "The most important aspect in the course of a proceeding"[10] is the *hearing* (cf. cc. 1661–1668), the central focus of an oral process, in which proofs are received and the case is discussed immediately.

In conclusion, it can be said that the tribunal may substitute oral discussion instead of written, if the parties consent, in marriage nullity cases as well (c. 1602 § 1).[11]

b) We have few normative instructions on how the oral discussion should proceed. According to the *CIC*, it is to be held *pro tribunali sedente* (c. 1602 § 1) and before a notary in accordance with the conditions set forth by the legislator (see commentary on c. 1605). A large area therefore remains in which the directives of the tribunal (c. 1602 § 3) are to structure the discussion. The expression *pro tribunali sedente*, which is translated as "before the tribunal in session," implies that discussion must take place before the judge sitting as a tribunal, and that it is not necessary to convene the entire college when there are several judges comprising the turnus.[12]

10. L. MADERO, "El proceso contencioso oral en el Codex iuris canonici de 1983," in *Ius Canonicum* 24 (1984), p. 282.
11. This is the opinion also held by C. GULLO, "La pubblicazione degli atti e la discussione della causa," in *Il processo matrimoniale canonico*, 2nd ed. (Vatican City 1994), p. 690; M.J. ARROBA, *Diritto processuale...*, cit., p. 413
12. Cf. C. DE DIEGO-LORA, commentary on c. 1602, in *Pamplona Com.*

1603 **§ 1. Communicatis vicissim defensionibus atque animadversionibus, utrique parti responsiones exhibere licet, intra breve tempus a iudice praestitutum.**

§ 2. Hoc ius partibus semel tantum esto, nisi iudici gravi ex causa iterum videatur concedendum; tunc autem concessio, uni parti facta, alteri quoque data censeatur.

§ 3. Promotor iustitiae et defensor vinculi ius habent iterum replicandi partium responsionibus.

§ 1. When the pleadings and observations have been exchanged, each party can make reply within a brief period of time determined by the judge.

§ 2. This right is given to the parties once only, unless for a grave reason the judge considers that the right to a second reply is to be given; if this right is given to one party, it is to be considered as given to the other as well.

§ 3. The promotor of justice and the defender of the bond have the right to respond to every reply of the parties.

SOURCES: § 1: c. 1865 § 1; *NSRR* 126 §§ 3 et 4, 128 § 1; *PrM* 180 §§ 1, 2 et 3
§ 2: c. 1865 § 2; *NSRR* 128 § 2; *PrM* 180 § 4
§ 3: *PrM* 183

CROSS REFERENCES: cc. 201 § 2, 1430, 1432, 1465 § 2, 1601–1602, 1606, 1725

COMMENTARY

Rafael Rodríguez-Ocaña

1. Once the parties or their advocates have prepared (c. 1602 § 1) their pleadings and observations and presented them at the office of the tribunal within the time limit stipulated by the judge (c. 1601), these pleadings and observations are exchanged to enable the parties, if they consider it advisable, to prepare their written replies within a short period of time set by the judge to do so. One of the aspects of the discussion of the case is obvious: the case proceeds adversarially.[1]

1. Cf. M.J. ARROBA, *Diritto processuale canonico* (Rome 1993), p. 411.

This prescription, given the wording of the canon, is applicable to written discussion only, since an exchange of documents and records can only occur in it.

2. Like the pleadings, replies are prepared in writing. Either the parties or their advocates may prepare them. In their replies, each party attempts to give a reasonable rebuttal *in iure et in facto* of the arguments presented by the opposing party.

Regarding the length of replies, printing, number of copies, and other similar details, the directives of the tribunal are to be followed (c. 1602 § 3). If there are no directives, the judge's instructions are to be followed. Both *PrM* (art. 182) and the current *NSRR* (art. 82) limit the number of pages to 10.

Any obligation of secrecy imposed by a judge under c. 1602 § 2 shall also apply to the responses.

3. The canon considers a reply to be a *ius* of the parties *in causa* (§ 2), whether public or private.

Jurisprudence and doctrine have ascribed varying scope to both the standing and the violation of the right to reply.[2] In effect, unlike the recognition given the right to argue by means of a written defense, violation of which would result in an irremediable nullity of the judgment (see commentary on c. 1601), it does not seem that a violation of the right to reply has the same effect, since this right does not belong to the essence of *ius defensionis*.[3]

The practical consequence that can be inferred from the canon is that there is no obligation to notify the other party of pleadings. It is true that they must be made available to the parties at the office of the tribunal, but the canon does not expressly say that the parties must be notified. From this point of view, the so-called right to reply could fall in the category of *procedural responsibility*. The concept of responsibility conceptualizes more accurately what is sometimes considered to be *procedural rights*, which in reality are options to act granted to parties by the legislator, which, if not exercised, would redound to the harm of the parties themselves. This concept of responsibility also has the advantage of delinking acts by one of the parties that fall under the definition of the right of defense.

Parties may expressly renounce their reply by so notifying the judge, or they may do so tacitly by letting the brief time limit expire that was set by the judge for submitting a reply in writing. In any case, a party that does so bears the consequences of this procedural action. Renouncing the right

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2. Cf. C. GULLO, "La pubblicazione degli atti e la discussione della causa," in *Il processo matrimoniale canonico*, 2nd ed. (Vatican City 1994), pp. 688–691.

3. Cf. ibid., p. 691; Signatura, c. GANTIN, April 20, 1991, in *Studia Canonica* 25 (1991), p. 411.

to reply is not exclusive to private parties: the defender of the bond or the promoter of justice, if they are appearing in the case, may also do so.

4. The judge may grant a brief time limit to enable the parties to reply after the pleadings and observations have been exchanged (§ 1). This time limit should be understood to be judicial time that is peremptory once it has lapsed. Since it is a time limit that is determined by the judge, an extension is admissible, either ex officio or at a party's request, for just cause, but if requested ex officio, a judge must first hear all the parties. However, this time limit cannot be validly shortened ex officio without the parties' consent (c. 1465 § 2). Since this is a canonical time limit, non-canonical days do not count for the purpose of figuring time lapsed (c. 201 § 2). The peremptory effect means that once the time limit has lapsed, the possibility of submitting a reply no longer exists, unless a party is in the situation described in c. 201 § 2; that is, time does not count for a party who is unaware.

It should be emphasized that the new discipline does not set a specific period of time for public parties as opposed to private parties. The *CIC* treats such parties the same, which was already the case in c. 1601, which prescribes that judges set a suitable period of time for presenting pleadings and observations. In this regard, the canon is governed by the principle of equality.

Finally, as far as the period of time is concerned, it is of interest for a better interpretation of the norm to compare the expression used by the legislator in the canon (*intra breve tempus*) with the wording used in c. 1601 (*congruum temporis spatium*). "*Brief* seems to be somewhat less than *suitable*, but neither are we informed how short this *brief* period of time may be.[4]" *PrM* set 10 days for all parties, including the promoter of justice and the defender of the bond, in which to reply (art. 180 §§ 2–3). The 1994 *NSRR* provided as follows: "Patronorum responsiones exhiberi poterunt usque ad diem decimam secundam ante causae sive principalis sive incidentalis definitionem; scripturae autem pro vinculo non ultra sextam diem ante decisionem" (art. 83 § 3). Given the fact that these periods mentioned in the previous law and the current *NSRR* are only guidelines for diocesan tribunals, it is to be hoped that these tribunal rules (c. 1602 § 3) will provide more specific norms for these periods so that judges will have uniform criteria that will eliminate unnecessary delays in cases (cf. c. 1453).

5. Paragraph 2 of the canon signals the general rule that the right to reply is available to the parties on a one-time basis only. Under exceptional circumstances, the judge may allow a *second reply*, provided it is justified by a grave reason. If this is allowed for one party, it must be assumed that it is allowed for the other party also.

4. Cf. C. GULLO, "La pubblicazione degli atti...," cit., p. 691.

Once again, clear influences of the principle of equality of parties is seen in this prescription. First, a reply is allowed once for all parties within the same peremptory time limit. Next, the opportunity of a counter-reply is also allowed equally to all parties, and we must understand further that the time limit allowed by the judge to do so must also be the same for all parties.

Tribunal rules should regulate matters related to time limits, allowing counter-replies, the number of copies, etc.; otherwise, the judge has the prerogative to do so.

6. Paragraph 3 of the canon contains a norm that is an exception—it breaks the principle of equality of parties maintained in the canon—that is taken from the former regulation of the marriage nullity process (c. 1984 § 1 *CIC*/1917 and *PrM* 183 § 1). The prescription, which now applies to *almost* all types of cases heard in an ordinary contentious process in which a public party intervenes, indicates that both the promoter of justice and the defender of the bond have the right to rebut replies made by the parties. This means they have the right always to be heard last.

The norm applies to all kinds of discussion: if in writing, the last reply belongs to the public party; and if oral, the defender of the bond or the promoter of justice must close the discussion with their observations.

This faculty is explained by the public nature of the offices of promoter of justice and defender of the bond. Their intervention in a process is still the intervention of a party defending in effect an interest (cc. 1430 and 1432), but shaped by the nature of their interest and the special protection the system extends to this interest. Therefore, for example, the documents submitted by the promoter of justice and the defender of the bond have a different name from those submitted by the parties. The parties submit pleadings, whereas the promoter of justice and the defender of the bond submit a *votum pro rei veritate* and an *anidmaversiones*, respectively. This is also why c. 1606 contains a provision making it mandatory for the judge to request observations from the public party, etc.

In my opinion, the norm given in § 3 needs to be supplemented—this could be done in the norms of the tribunal—for two reasons. It does not specify who should intervene last when both the promoter of justice and the defender of the bond intervene in the same case. It seems logical to assume that the principle of equality would apply in the strict sense. Secondly, it would also be quite advisable to set a time limit for the last intervention by a public party, as *PrM* 183 § 2 did for marriage cases: "if the defender of the bond does not reply within ten days, it is to be presumed that he has nothing more to say, and the case may proceed."

An exception to the faculty prescribed in § 3 is found in c. 1725: in a penal process, unlike a contentious process, the respondent or his or her advocate or procurator always has the right to write or speak last.

1604 **§ 1. Omnino prohibentur partium vel advocatorum vel etiam aliorum informationes iudici datae, quae maneant extra acta causae.**

§ 2. Si causae discussio scripto facta sit, iudex potest statuere ut moderata disputatio fiat ore pro tribunali sedente, ad quaestiones nonnullas illustrandas.

§ 1. It is absolutely forbidden that any information given to the judge by the parties or the advocates, or by any other persons, be excluded from the acts of the case.

§ 2. If the pleadings in the case are made in writing, the judge may, in order to clarify any outstanding issues, order that a moderate oral discussion be held before the tribunal in session.

SOURCES: § 1: c. 1866 § 1; *NSRR* 132 § 1; *SNAS* 53
§ 2: c. 1866 §§ 2 et 3; *NSRR* 132 § 1, 133 §§ 1 et 2; *PrM* 186 §§ 1–4; *SNAS* 31–33, 52

CROSS REFERENCES: cc. 1452, 1456–1457, 1472, 1598 § 1, 1601, 1602 § 3, 1603 § 3, 1605, 1608 § 2

COMMENTARY

Rafael Rodríguez-Ocaña

1. *Prohibition against private information*

a) Paragraph 1 of the canon absolutely prohibits giving the judge any private information that is not reflected in the acts of the case. This prohibition goes back to c. 236 § 1 of the 1976 *Schema*.[1]

The wording of the counterpart canon in *CIC*/1917 was less specific than the current canon, since it prohibited advocates from providing *information orally*—without mentioning any reflection thereof in the acts—to the judge to illustrate circumstances in law and in fact related to the case (c. 1866 § 1). This canon extended a prohibition that Pius X had previously established to eliminate from the City a certain custom of the Curia of which private oral information is a vestige.[2]

1. Cf. *Comm.* 11 (1979), p. 137.
2. Cf. I. GORDON, "Discorso generale sui libri IV et V del 'Codex,'" in *Atti del Colloquio Romanistico-Canonistico (febbraio 1978)* (Rome 1979), pp. 328–330.

Former canonical doctrine, in commenting on the *CIC*/1917 prescription, focused on two issues: the judge's impartiality and the parties' right. Thus, this doctrine maintained that the prohibition came into play when information is intended to influence the judge to distinguish such information from later clarifications requested of the parties by the judge on some point related to their pleadings, which is not incurred in this canon.[3] At the same time, the possibility exists that private information might constitute a violation of the right to defense of the opposing party, who could not refute an argument of which he or she is unaware.[4]

b) The current canon, which prohibits giving private information to the judge, is broader and of greater amplitude than its predecessor. These comments manifest themselves in the following aspects: information of any kind, oral or written, is prohibited; the prescription is extended to the parties and third parties, in addition to the advocates; and the reason for the prohibition is based on the fact that said information is not included in the acts of the case.

The 1994 *NSRR*, however, has not taken these issues into account: art. 86 § 1 still mentions oral information only ("informationes orales ad Iudicem ne fiant"), making no mention whatever of the acts of the case.

This prescription guarantees and protects various fundamental aspects that, as the former canonical doctrine mentioned above made clear, makes a just proceeding and the judge's judgment possible.

Indeed, prohibition of private information—an expression of the ancient aphorism *quod non est in actis non est in mundo*—ensures, on one hand, that a case will proceed in accordance with the principles of openness and an opportunity to reply, which are closely linked to the right of defense. From this, it can be deduced that statements made by the advocates, parties, or third parties must be reflected in the acts (c. 1472) so that the parties or their representatives may enjoy access to them (c. 1598 § 1) and argue for or against when opportune, at the proper phase of a case (c. 1601). This prohibition thus protects the parties' inviolable right of defense. It should be noted that the exception provided under c. 1598 § 1—which authorizes a judge to decree that a certain act not be disclosed to anyone, provided the parties' right of defense is safeguarded—referred to an act that *is* in the acts of the case, not private information. Such information, if not reflected *in actis, non sunt in mundo.*

On the other hand, the prohibition also protects principles affecting the judge's impartiality in his dual capacity of presiding over the proceedings and deciding the case. In effect, accepting private information may be grounds for corruption by the judge because of the danger of suasion and

3. Cf. F. ROBERTI, *De Processibus*, II (Rome 1926), p. 166; F.X. WERNZ-P. VIDAL, *Ius canonicum*, VI (Rome 1927), p. 530.
4. Cf. F.X. WERNZ-P. VIDAL, *Ius canonicum*, cit., p. 530.

subornation thereby entailed (cc. 1456–1457). Therefore, judges cannot use said information, either in making procedural decisions[5] (c. 1452) or in deciding the merit of a case outside of the acts and proofs (c. 1608 § 2).

c) Systematically, it would have been better to place the prohibition given in § 1 of the canon among the norms regulating the discipline to be followed in tribunals (cf. cc. 1446ff), since in actuality this prohibition affects the entire process, not just the judgment phase. Leaving it here is a vestige of c. 1866 *CIC*/1917 § 1 of which rejected *oral information*, but §§ 2–4 of which allowed *moderate oral discussion*. In the *CIC*, however, oral discussion in its entirety is taken up under c. 1602 § 1 and not simply as a supplement to written discussion, which is treated in § 2 of c. 1604.

2. *A moderate oral discussion may be held*

a) If the discussion of a case is in writing, the judge may authorize a moderate oral discussion (*moderata disputatio*) before the tribunal to clarify certain matters.

This *moderata disputatio*, as we have just pointed out, differs from oral discussion as described under c. 1602 § 1 for various reasons, including the phase of the case at which it takes place, the purpose to be achieved, requirements for authorizing it, and its procedural nature. The differences may be seen in the following table:

	Oral discussion (c. 1602 § 1)	*Moderate oral discussion* (c. 1604 § 2)
Procedural phase	After conclusion of the case (c. 1601)	After written discussion (c. 1604 § 2)
Purpose	Discussion of the case in general	To clarify questions after discussing the case in general in writing
Requirements for authorization	By the judge, with the parties' consent (c. 1602 § 1)	Judge must consider it advisable (c. 1604 § 2)
Procedural nature	Instead of written discussion (c. 1602 § 1)	In addition to written discussion (c. 1604 § 2)

b) As has been said, the *CIC*/1917 allowed moderate oral discussion, but unlike the current Code, the governing rules were subject to some

5. Cf. M.J. ARROBA, *Diritto processuale canonico* (Rome 1993), p. 414.

limitations and formalities. Based on c. 1866 *CIC*/1917, doctrine signaled the following:

— moderate oral discussion was allowed *coram iudice pro tribunali sedente*;

— a request for it originated with the parties, public or private, and the judge allowed it if he considered it advisable;

— the party requesting discussion had to submit a written brief listing the issues to be discussed;

— the decree allowing discussion, which notified any public parties—if they intervened in the case—as well as the private parties, that the judge had to specify the questions to be discussed and the date and time of discussion;

— generally, the adovcates and procurators were allowed to participate in the discussion, not the parties;

— a notary attended if the judge so ordered or if the parties so requested and the judge consented;

— it was the custom to hold the discussion shortly before the judgment of a case;

— the format of discussion was a decorous examination of questions that were asked of both parties by the judge;

— and if the issues to be discussed involved an expert opinion, the judge could call an expert to clarify doubtful issues requiring expertise.[6] Later, *PrM* regulated certain aspects of the preceding as in marriage cases under article 186.

c) The current canon eliminates many of these requirements and leaves a broad area to norms of the tribunal (c. 1602 § 3), although this is not expressly said, so that the tribunal norms can regulate the most important aspects of *moderata disputatio*.[7] In any case, there are some specific prescriptions in the current canon that should be commented on.

Moderate oral discussion is intended to be in addition to written discussion. Given the clarity of § 2, it does not seem that it can also be authorized to supplement oral discussion: "if the pleadings of the case are made in writing," which seems to be a prerequisite. A certain author holds otherwise—if we understand him correctly—maintaining that there is "the possibility of repeating the oral session for clarification. The new process as a whole supports this broad interpretation."[8]

6. Cf. F. ROBERTI, *De Processibus*, cit., pp. 166–167; F.X. WERNZ-P. VIDAL, *Ius canonicum*, cit., pp. 530–531.
7. Cf. I. GORDON, *Novus processus nullitatis matrimonii. Iter cum adnotationibus* (Rome 1983), p. 37.
8. J.Mª. PIÑERO, *La Ley de la Iglesia*, II (Madrid 1985), p. 541.

The procedural point at which moderate oral discussion is held follows the completion of written discussion (i.e., after the rebuttals, if there were any, and in any case, after the last intervention of the promoter of justice or the defender of the bond: c. 1603 § 3) and precedes the judgment of the case.

This procedural initiative may originate with the public or private parties or the judge ex officio, in sharp distinction from earlier practice.[9] The judge does not need the parties' consent.

A judge may order moderate oral discussion. Determining whether or not there is a need for such a discussion to be held is up to the judge. It seems that the legislator gives more importance to any doubts a judge may have subsequently to written discussion than to the parties' questions.

The purpose of *disputatio*, as was the case in *CIC*/1917, is limited to questions that were not satisfactorily explained in the written discussion or which gave rise to doubts. The norm therefore has to do with issues of detail or nuance or some other particular matter to the case contemplated in the norm.

Moderate oral discussion is held before a judge sitting as a tribunal. Under certain conditions, c. 1605 regulates the presence of a notary.

9. Cf. F.X. WERNZ-P. VIDAL, *Ius canonicum*, cit., p. 530.

1605 **Disputationi orali, de qua in cann. 1602 § 1 et 1604 § 2, assistat notarius ad hoc ut, si iudex praecipiat aut pars postulet et iudex consentiat, de disceptatis et conclusis scripto statim referre possit.**

The notary is to be present at the oral discussion mentioned in Cann. 1602 § 1 and 1604 § 2, so that, if the judge so orders, or the parties so request and the judge consents, the notary can immediately make a written report of what has been discussed and concluded.

SOURCES: c. 1866 § 4; *NSRR* 133 § 3; *PrM* 186 § 5

CROSS REFERENCES: cc. 483–485, 1437, 1602 § 1, 1604 § 2

COMMENTARY

Rafael Rodríguez-Ocaña

1. The canon prescribes that a notary be present at any oral discussion taking the place of the written discussion (c. 1602 § 1) as well as any moderate oral discussion supplementing the written discussion of a case (c. 1604 § 2) to make a written report immediately of matters that have been discussed and any conclusions reached in both discussions.

The notary's presence, although required by the canon (*assistat notarius*), is nevertheless subject to the judge's order or a petition by the parties to the case and the judge's consent.

Canon 1866 § 4 *CIC*/1917 regulated a notary's presence in virtually the same way the current norm does, with the exception that the *CIC*/1917 only mentioned moderate oral discussion, since exclusively oral discussion of a case did not exist.

2. A reading of the canon points out that the notary's duty in moderate oral discussions is different from what a notary usually does throughout the process in accordance with c. 1437, that is to validate the acts, which are null and void if not signed by the notary (c. 1437 § 1), and certify said acts and therefore the judicial acts (c. 1437 § 2). As de Diego-Lora so cleverly points out, if this were the only duty a notary performed during these oral proceedings, c. 1605 would be superfluous, since this duty is already described in c. 1437.[1]

1. Cf. C. DE DIEGO-LORA, commentary on c. 1605, in *Pamplona Com.*

From this, two consequences may be deduced that are valid for the interpretation of the canon:

a) A notary's presence at these oral discussions about the discussion of a case is not necessary *ope legis*. The canon's wording, *assistat notarius … si iudex praecipiat*, contrasts with that of 1437 § 1: *cuilibet processui intersit notarius*. The latter sets no condition whatever for a notary's participation. A notary is to be present during the entire proceeding, unless a more specific norm, like c. 1605, prescribes otherwise. On the other hand, the wording of c. 1605 leaves the presence of a notary up to the judge, who may determine it at his own discretion or at the petition of the parties.

Some authors, invoking various reasons—prudence or foresight so that a judge will have a record to consult when making his judgment in the case or the principle of *quod non est in actis, non est in mundo*—recommend that a notary's presence be made mandatory or that at least, a written record of the oral discussions always be made.[2] It seems advisable that this recommendation should especially apply to oral discussion pursuant to c. 1602 § 1, since—unlike moderate oral discussion, whose purpose is to clarify certain outstanding issues: c. 1604 § 2—the oral discussion encompasses the entire probative instruction of the case.

b) The purpose here of a notary's participation ordered by a judge is to ensure the position maintained by the intervening parties and conclusions reached by faithfully and immediately (*statim*) making a record of the matters mentioned during the discussion of an entire case or certain issues requiring clarification.[3] This record will be added to the acts of the case.

2. Cf. L. CHIAPPETTA, commentary on cc. 1604 § 2 and 1605, in *Il Codice di diritto canonico. Commento giuridico-pastorale*, II (Naples 1988); J.Mª. SERRA, commentary on c. 1605, in *Commento al codice di diritto canonico* (Rome 1985).

3. Cf. C. DE DIEGO-LORA, commentary on c. 1605, cit.

1606 **Si partes parare sibi tempore utili defensionem neglexerint, aut se remittant iudicis scientiae et conscientiae, iudex, si ex actis et probatis rem habeat plane perspectam, poterit statim sententiam pronuntiare, requisitis tamen animadversionibus promotoris iustitiae et defensoris vinculi, si iudicio intersint.**

If the parties neglect to prepare their pleadings within the time allotted to them, or if they entrust themselves to the knowledge and conscience of the judge, and if at the same time the judge perceives the matter quite clearly from the acts and the proofs, he can pronounce judgement at once. He must, however, seek the observations of the promotor of justice and the defender of the bond if they were engaged in the trial.

SOURCES: c. 1867; *NSRR* 71, 73 § 1, 131; *PrM* 89 § 4

CROSS REFERENCES: cc. 1430, 1432–1433, 1452, 1465 §§ 2 et 3, 1481 § 1, 1601

COMMENTARY

Rafael Rodríguez-Ocaña

1. This canon regulates the procedural consequences of two types of positions that can be taken by private parties related to discussion of the case, more specifically, neglecting to present defense pleadings within the suitable time period set by the judge (c. 1601) and entrusting themselves to the justice of the tribunal ("the knowledge and conscience of the judge"). In both cases, the procedural consequence is as follows: the judge, if he has full knowledge of the cause by virtue of the parties' pleadings and contributions obtained during instruction, he can, after having obtained observations from any intervening public parties, proceed immediately to pronounce a judgment.

The parallel canon in *CIC*/1917 (c. 1867) did not mention public parties at all. It only alluded to the renunciation of defense or yielding to justice in contentious cases of private interest.

This manner of addressing the judge's attitude with regard to a party's activity and the private or public nature of the object of judgment are illustrative, and the canon should be interpreted with this in mind. According to the resulting application:

a) In cases of private interest: if the parties entrusting themselves to the justice of the tribunal do not present pleadings of defense within the suitable time limit, and if the judge has a full understanding of the case

from the declarations and proofs, he may immediately proceed to pronounce judgment;

b) In cases of public interest: the same attitude of private parties implies that the judge may also immediately proceed to pronounce judgment, but must first request observations from the promoter of justice and defender of the bond.

2. By comparing the two types of cases, we can reach certain conclusions and raise a question that is difficult to interpret.

The first conclusion is quite clear, in our opinion: private parties may renounce the discussion of the case. In other words, they may elect not to make any oral or written pleadings of defense or observations. This renunciation may be tacit if the time for submitting a reply expires, or it may be express, if the parties entrust themselves to the knowledge and conscience of the judge.

Private parties may make this choice in cases of either public or private interest, and the procedural right to do so is grounded on the fact that "this defense is an act that requires the setting in motion of an appropriate procedural act which may be ignored by the litigant as long as he or she is prepared to face the consequence of the inactivity.[1]"

The fact that the judge may have ex officio appointed an advocate or procurator for a private party because he considered it necessary does not change the situation (c. 1481 § 1): the right of defense belongs to the private party, not his or her advocate or procurator who assists and represents him or her, respectively, but always submitting to the general instructions given by said party with regard to the defense of his or her interest.

Nor may a judge ex officio, on the basis of the broad discretion authorized under c. 1452, oblige private parties to raise a given act if the legislator has left it to their free choice. As said canon indicates, the judge may propose proofs and even exceptions and proceed ex officio in general, but only if a passive or neglectful action by the parties might result in an injustice or nullification of the final judgment, which would not be the case if the discussion of the case was in accordance with the law and a private party had tacitly or expressly renounced.

Finally, in any type of case, private parties may always renounce the procedural phase of discussion of the case and last pleadings granted by the legislator.

3. About the second conclusion, on the other hand, the canon is not so clear[2] with respect to public parties and the request for their observations,

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1. C. DE DIEGO-LORA, commentary on c. 1606, in *Pamplona Com.*
2. Cf. C. GULLO, "La pubblicazione degli atti e la discussione della causa," in *Il processo matrimoniale canonico*, 2nd ed. (Vatican City 1994), p. 689.

which request must be sent to them by the judge prior to pronouncing judgment.

The interpretation of the canon on this point is as follows: private parties have allowed the time limit provided under c. 1601 to expire or have entrusted themselves to the knowledge and conscience of the judge; therefore, there are no pleadings of defense by said private parties. Before pronouncing judgment, the judge must request observations from the public parties. These observations are not replies by a public party, since the parties have not exchanged pleadings of defense.[3]

But what does it mean that a judge must *request*[4] observations from public parties? In this case, does *request* mean an obligation to wait until the promoter of justice and defender of the bond send him their opinion? Can a judge not proceed until he has obtained said observations? Under the principle of equality of parties, do the public defenders have time limits or judicial delay in which to comply with this obligation? The canon's wording, which does not seem quite clear to me, invites such questions.

From my point of view, the legal obligation seen in cc. 1430 and 1432 of the public parties to perform their duties properly does not constitute a limitation on a judge's actions in the context of a case; that is, if the public parties do not perform the procedural responsibilities incumbent upon them, this does not necessarily mean that the judge cannot proceed to the next procedural phase upon expiration of the time limit in which a public party should have performed some procedural act.

Thus a judge, once he is aware of a tacit or express renunciation by the private parties, must allow the defender of the bond and the promoter of justice a time limit when requesting them to submit their observations. If upon expiration of this time limit the observations have not been submitted, and the time has not been extended (cf. c. 1465 §§ 2 and 3), the judge may immediately pronounce judgment on the merit of the case if he has full knowledge of it.

If a judge so proceeds, this would not seem to affect the right to defense of the public interest. In any case, there would be negligence by the public parties in the performance of their duties. Neither does the situation of fact obtain per c. 1433, since both the defender of the bond and the promoter of justice are *required* by the judge to submit relevant observations within the time limit allowed.

It would be a different matter if the public party—since he always acts *pro rei veritate*—having been asked for observations, replies that he or she has nothing to say. In any case, this reply must also be made within the time limit set by the judge.

3. Cf. J.Mª. PIÑERO, *La Ley de la Iglesia*, II (Madrid 1985), p. 541.
4. Cf. C. GULLO, "La pubblicazione degli atti...," cit., p. 689.

In practice, it seems that a reply by the public party that he has nothing to say would be the same as entrusting himself or herself to the knowledge and conscience of the judge, who would then proceed to pronounce judgment. However, there is a nuance that distinguishes a public party's entrusting himself or herself to the justice of the tribunal from the defender of the bond's having nothing to say. The reply by the public party would presume that *rationabiliter* nothing is against the declaration of nullity (cf. c. 1432).

TITULUS VII
De iudicis pronuntiationibus

TITLE VII
The Pronouncements of the Judge

INTRODUCTION

Carmelo de Diego-Lora

1. *Preliminary consideration*

It seems preferable to use the expression *judicial pronouncements*, instead of the term used by the *CIC* in this heading, because these pronouncements can come from the judge as well as from a collegiate tribunal. This would depend on the composition of the judicial body in each process, be it of one person (cf. cc. 1420, 1424, 1657 and 1686) or collegiate (cf. cc. 1425 and 1426). Moreover, the auditors appointed to instruct the case may also issue judicial pronouncements (cf. c. 1428), or in some cases only the president of the tribunal may do so (cf. cc. 1449 § 4), or the president or the *ponens* without distinction (cf. c. 1677 § 1), and even on rare occasions the proper bishop (cf. c. 1449 § 2).

We are, however, excluding from the classification of judicial pronouncements decisions proceeding from the bishop of the diocese for the execution of judgments pursuant to c. 1653 § 1, or from the Religious Superior according to the provisions of c. 1653 § 3. Religious Superiors may, however, also make judicial pronouncements in the situation set forth in c. 1427 §§ 1 and 2.

2. *Nature of judicial pronouncements*

All judicial pronouncements *are statements of will formally expressed by judges or tribunals.* Among procedural judicial acts as a whole, which constitute the very scheme of the process, judicial pronouncements are fundamental for the initiation of the process (cf. c. 1505 § 1) as well as for its development (cf. for example, cc. 1507, 1513, 1516, 1589, 1592, 1596 § 2, 1597, 1598, 1600, 1601, 1604 § 2 and 1606 regarding the ordinary contentious trial), as well as its termination (cf. especially

the canons under this title, in addition to the provisions for the oral contentious trial in c. 1668, as well as the specific references made to the judgments by norms belonging to the diverse special processes).

They are statements of will formally formulated in the process during the so-called judicial recognition and not in the execution of the judgment. In this latter period it devolves upon judicial organs to make only one specific type of pronouncement called "execution decrees" (cf. c. 1651), as well as the decision required for the incidental statement of accounts prior to execution of the judgment, when it becomes necessary (cf. c. 1652). Through the pronouncements, the judicial body initiates, orders, and imposes the discipline in its see (cf. cc. 1470 and 1487), expedites the contentious process, instructs it and makes the final ruling.

If the so-called procedural juridical act, which is understood to be those statements of will by the parties that produce the juridical effect intended by those making them, (in spite of the importance that the principle of initiative (cf. c. 1501) has in the canonical process), does not take place, *it is always the judicial pronouncement that mediates between any petition by a party and the effect desired thereby* when it makes its petition. This is done in order to admit the petition (cf. c. 1505), as well as for the defendant to defend and reply (cf. c. 1507), in order to establish the joinder of issues (cf. c. 1513), in order to bring proofs to the process (cf. cc. 1526ff, *passim*), as well as to publish them, reach the conclusion of the case, admit new proofs or formulate the ultimate pleadings (cf. cc. 1598–1605).

Although the principle of initiative is present throughout the entire process, it is the judicial statements of will that produce the procedural changes promoted by said initiative as well as the advances requested for the process to develop. Additionally, although there are certain concessions to the principle of the disposition, the effects intended by the petitions of the parties do not take place until the *ad hoc* judicial pronouncement (cf. cc. 1524 § 3 and 1636).

Lastly, c. 1452, the establishment of norms of judicial conduct characteristic of the process inspired in the principle of inquiry, with initiatives and even substitutions of the judicial body in the event of negligence by the parties, demonstrates even more the importance that judicial pronouncements have in the canonical process. And that which is stated regarding the process when it is handled in its first stage of cognizance likewise applies to the second stage and the last instance, if any (cf. c. 1640), as well as in the presentation, development, and resolution of special challenges of total reinstatement (cf. cc. 1645–1648), *nova causae propositio* (new presentation of the case) in processes on the status of persons (cf. c. 1644), and for the *querela nullitatis* (plaint of nullity, cf. cc. 1624 and 1626). In fact, although this latter case may be proposed together with the appeal (cf. c. 1625), taking into account the terms that the *CIC* grants for its autonomous exercise (cf. cc. 1621 and 1623), it can also

be described as a special appeal because, through nullity, the same actual adjudged matter resulting from the judgment being challenged can be secondarily affected.

3. *Judicial pronouncements do not exhaust the activity of the body of justice*

Statements of will set forth in judicial pronouncements constitute the first and fundamental manner in which judges and tribunals act in the process. Nonetheless, this does not prevent organs of judicial power from performing other acts in the process, which acts have come to be called *real acts*. They are acts with the presence of the judge that can be receipt of the will of the parties, receipt of proofs presented in his presence, at times with active postures being adopted, others being merely passive, sometimes for investigation, at other times mere hearings. These may be in connection with the parties or with their advocates, or with regard to witnesses, or to experts (to analyse each case, for these various purposes, cf. cc. 1530, 1535, 1544–1545, 1548, 1559–1563, 1569 § 2, 1570, 1578 § 3, 1582, 1604 § 2).

4. *General scope of the canons of this tit. VII*

It bears emphasising that, in general, the canons mentioned thus far belong to part II, sec. I of book VII, that is, to the same part that is included in tit. VII, now under discussion. Therefore, one could believe that what has previously been set forth only applies for the classic prototype of the ordinary contentious trial and not, for the processes included in part II, sec. II, the oral contentious trial, or for the special trials of parts III and IV. Nothing could be further from our intent, given that the provisions of tit. VII, under discussion, equally apply for all canonical contentious trials, ordinary, oral, or special. Although the latter may have some particular norm that refers specifically to real acts of the judicial organ, as well as its declarations of will, or the manners and times in which judicial pronouncements are made, these peculiarities do not detract from the overall nature of this tit. VII.

In fact, this occurs in the oral process with the hearing act (cf. cc. 1662, 1663 § 1, 1668) as well as in nullity of marriage cases included in the documentary process (cf. cc. 1676, 1677 §§ 2 and 3, 1681, 1686, 1688). One should not forget, however, for these purposes, the broad force of express application enjoyed by the canons on the ordinary contentious trial, when there is no distinct specific norm, for the oral contentious process (cf. c. 1670) as well as for special trial for nullity of marriage (cf. cc. 1690–1691). This latter trial, as is well known, is the process occupying the majority of the overall activity of the judicial organs of the Church, except that of the Signatura.

The broad application of this tit. VII to judicial pronouncements in general, as we have mentioned, would have made it advisable to have common norms therefore, perhaps adding a new title to part I of book VII, to be applied in general to all processes. And the same could be said of other procedural acts such as those resulting from the canons regarding citations and notifications, as well as the general principles in connection with the proofs. The *CIC* has preferred to follow different criteria. Instead of dedicating another title to procedural acts in general, in the canons of said part I has been found a very complete ordinary contentious process that can also serve as a model for the procedural conduct of the remaining types of processes that are regulated, in which reference will be made in principle to the provisions in said canons of part II (provided that juridical operator does not find any particular or special applicable norm). In this way, the so-called *ordinary contentious trial* of part II, sec. I becomes a complementary general norm, inevitably and constantly applied, in the remaining procedural types established by the *CIC.*

5. *Types of judicial pronouncements*

Judicial pronouncements may be, in the first place, ex officio, when they proceed from judicial initiative, of which there are the least in the canonical process. They can also originate from what is usually called, in procedural terms, *at the request of the party*, that is, when required by specific requests formulated at the beginning or during the development of the case by the litigants. This is an initial criterion for classification, concerning the source originating the same procedural act.

However, acts promoted on the initiative of the parties can have diverse meanings, according to whether the judicial body admits or rejects the request. A significant example of these procedural methods is offered by c. 1505 § 1, when it provides that "*Iudex unicus vel tribunalis collegialis praeses ... debent suo decreto quam primum libellum aut admittere aut reicere.*" From this it can be concluded that judicial pronouncements, (not only decrees, as could be understood from a literal interpretation of c. 1505 § 1, which is explained in its own context), when made at the request of the party, can , in turn, *admit* what is requested; or *reject* if it does not agree to what is asked.

The most traditional classification of judicial pronouncements is based on the manner in which that statement of will is issued. In all orders of procedure there are forms of greater or lesser solemnity. The selection of one form or the other does not result from a mere choice or the discretion of the judicial organ, but from the greater or lesser importance of the role of the pronouncement. The form is determined by the importance that the judicial resolution is going to have for the object of litigation, for the parties, or for the procedure activity itself that is carried out in the

process. These variations on judicial pronouncements do not lie, therefore, merely in the form adopted, but rather precisely in the form required by the significance of the juridical matter handled in the judicial resolution.

For the more important pronouncements, the *CIC* uses the word *judgment* (cf. c. 1607). Without prejudice to what is set forth in the specific commentaries on the canons of this tit. VII, the following should now be set forth:

—*judgments* may fall into two different categories, according to the object of litigation submitted to judgment and resolution: *a) definitive judgments* that resolve the question of law, called in c. 1607 the "principal case;" and *b) interlocutory judgments*, that decide incidental matters that the judge, when admitting them, decides from the beginning to resolve as a judgment (cf. c. 1589 § 1);

—judicial pronouncements of less importance, because they resolve incidental matters of a merely procedural nature, are designated under the name of *decrees*. Not all decrees are the same, because we find: *a)* those containing mere orders, such as those that expedite the case or those ordering citations, etc., which are *decrees without the need for a legal foundation*, mere procedural orders; and *b) decrees with a legal basis*, requiring an explanation of the legal reasoning (cf. c. 1617). All decrees are also considered *interlocutory decrees*, because they never resolve the claims making up the main issue.

Canon 1618 indicates one more category, common to decrees and interlocutory judgments. The distinction refers not so much to their common interlocutory nature as to the effect that these pronouncements can acquire in connection with the judicial decision that may be pronounced in the future in relation to the question of law or main issue, and on which, in some way, they can determine or prevent the final pronouncement as its secondary effect.

Consequently, the following are the distinctions that the *CIC* also sets forth: *a)* interlocutory judgments or decrees *with the force of a final judgment*, when they prevent or put an end to the trial or an instance thereof; and *b)* interlocutory judgments or decrees *lacking the force of a final judgment.*

Without prejudice to the specific commentary of c. 1618, it can also be noted that the force of a definitive judgment or, rather, the definitive effect of interlocutory judicial pronouncements does not restrict, in our opinion, those that end the trial or the instance. Therefore we must consider other incidental matters the judicial pronouncements of which may have a given final effect that will determine in some way, later, the judgment pronounced in the case in chief. Article 214 § 2 of *PrM* offered us a concept of *final force* of the interlocutory judgment or decree that retains all its value: "*quum gravamen inferant quod non potest per definitivam*

sententiam reparari." As an example it indicated the hypothetical situation of a judge rejecting evidence that could truly influence the judgment to be pronounced.

Canon 1618 tries to anticipate, without differentiating between interlocutory judgments and decrees that have the force of a final sentence, any event that could take place, without the possibility of legal measures, which would result in a judicial pronouncement with definitive effects, without being limited to what form of pronouncement is selected, at the initiation of the incidental proceeding, by the judicial organ. The provisions of the *CIC* consider more the effect of the pronouncement than the judicial form chosen for its issuance. This option by which the *CIC* is decided has major importance with respect to the possibility of resorting to an appeal against said pronouncement, given that judgments and judicial decrees that are effective, or have the force (as stated in c. 1629, 4°), of a definitive judgment, are susceptible to appeal, while when they lack that effectiveness, they are not subject to appeal through ordinary means.

It seems unnecessary to state the following, but it is clarified in order to avoid misunderstandings. When c. 1618 determines that there are decrees that have the force of a definitive judgment, it departs from the supposition that they are decrees based on law, of those which c. 1617 requires that *motiva exprimant.* Should we at any time be faced with a decree without a legal basis with that definitive force, rather than appeal against it, it would be necessary to move for its nullity through a *querela nullitatis*, applied by analogy with c. 1622, 2°, also related to the requirement of c. 124 § 1 for the existence of a valid juridical act. Among others, these are: that the elements essentially constituting that act be present, the jurisprudence of the apostolic tribunals is well-known, whereby they have declared null the decrees confirming the nullity of marriage, pursuant to c. 1682 § 2, when they lacked legal bases.

6. *Common structure of judicial pronouncements*

Each type of judicial pronouncement has its own structure. And not only an external structure or juridical form that it must adopt for its issuance, but also an internal structure, belonging to the spirit of legality that must inspire all judicial procedure. At times the distance between one type of pronouncement and another may seem, depending on their importance in the process, so great that they lead one to believe that there are no similarities between them. However, inasmuch as all these pronouncements come from abody of the judicial power designated by the legislator to carry out the task of administering justice in the Church and, at the same time, with all of them partaking of the same character, (statements of will of the judicial organs formulated in a legal form), one can conclude that what formally and intrinsically seem so different to us nonetheless

enjoy some common elements that give the full and comprehensive dimension of what should be understood at least as constituting the juridical act called the procedural pronouncement. Let us then proceed to indicate both levels, the extrinsic or formal level of the judicial pronouncement and the intrinsic level, that constitutes it as such.

a) *Formal structure*

The formal structure, because it is the external clothing with which the judicial pronouncement is made, allows wide variations according to whether it is a judgment, a reasoned decree, or a mere procedural decree. It is sufficient to refer to cc. 1611–1613 and 1617, and to the commentaries on these canons. However, we can find some *elements common to all these judicial pronouncements*:

1°) There is a need for a *juridical form*, whether it is the legal form, if it was thoroughly described by the legislator, as occurs with judgments, or whether it is the minimum form established by the legislator, as occurs with decrees, There may be a need also forjuridical reasoning if the nature of the decree so requires, or just the order, if the decree is merely procedural (cf. c. 1617).

2°) Another formal requisite is the *jurisdictional competence*, at least the absolute one, of the judicial body making the pronouncement. The provisions of c. 1620, 1°–2° for the judgment inevitably include every judicial pronouncement in that they discuss absolute nullity, in the event of the defects indicated.

3°) Every pronouncement must be *issued within the process*, because any decision adopted by the body of judicial power outside of the process and not incorporated therein is an act that, although juridical, would not be an act of the process. The same occurs with mandates of proxies or advocates which, although they were executed in the presence of a notary for the purpose of being used in the process, it would not be an authentic mandate for the judge or tribunal until said mandate is duly submitted before them (cf. c. 1484). This reference is only to be used as an example, c. 1472 is the one requiring written evidence of all judicial acts, such that the old procedural principle *quod non est in actis non est in mundo* is established. Additionally, for all acts in hearings, which can be limited to being only real acts, before a judge or tribunal, it is required, under notice of nullity (cf. c. 1437 § 2), that a record be drawn up and signed by a notary, be they oral reports in the ordinary contentious trial or acts of a hearing in an oral contentious trial, in which there are usually verbal judicial pronouncements (cf. cc. 1661 and 1668 in connection with c. 1664). Every judicial pronouncement, albeit set forth in the record, or drafted independently and incorporated into the procedural acts, will have to give notice from the body issuing it, in order that its jurisdiction and competence be recognized, and it also must set forth the specific process to which it belongs, outside of which it lacks all juridical cause.

4°) Also the *date* with the day, which must indicate the month and year in which the pronouncement is issued, as well as the place in which it was made (cf. cc. 1612 § 3 and 1622, 4°). This is a formal element that must be recorded in writing in every judicial pronouncement.

5°) All judicial acts require the *signature* of those who have participated in the acts that are recorded, along with the signature of the notary attesting the content of the records (cf. c. 1473). This requirement is even more appropriate for judicial pronouncements, acts of the judges and tribunals, or their delegates or auditors as applicable. This is expressly required by c. 1612 § 4 for the judgmen,; and c. 1622, 3° indicates nullity, albeit remediable, incurred by its omission. We can also add the threat of nullity of c. 1437 § 2 for the lack of authentication of acts by the notary if he did not sign them. Just as c. 1612 applies to every judgment, even if it is not pronounced in an ordinary contentious trial, the requirement for certification, which means the signature identifying the author and the official authenticating it, of any judicial pronouncement makes the pronouncement liable to be found null in the event of omission.

6°) Judicial pronouncements, lastly, must be made by the judicial body that is competent *within the territory* of its jurisdiction. Only in the hypothesis of c. 1469 could there be judicial action *extra territorium*, but the judicial body is subject to the conditions established for this purpose by said canon.

b) *Intrinsic structure*

If every judicial pronouncement requires a formal structure that is manifested externally, the procedural act, as every juridical act, must also consist of some intrinsic elements. It is worth noting c. 124 § 2 when it establishes the presumption of validity referring to the so-called external elements, which means that every objection caused by essential deficiencies or defects of the internal elements must be demonstrated in the respective procedural adversarial action. These internal elements common to all judicial pronouncements are, in our opinion, the following:

1°) They must be *congruent* with the juridical situation in which they are pronounced. For the judgment, this need for a consistent response is particularly required by c. 1611, 1°. It would be improper due to its irrelevance, for said requirement to not also be required for decrees, be they merely procedural or reasoned in law.

The consistency of the decision with that which is requested by the party, or with the situation that ex officio deserves to be resolved by the judicial organ, is the one condition *sine qua non* of all judicial pronouncements. Neither the judge nor any tribunal could be thought to be able to issue arbitrary pronouncements outside the function that the specific process intends when the complaint is accepted, and later when the formulation of the issue is established (cf. c. 1513). Neither the pleas of the parties, the evidence presented, nor the judicial pronouncements can be presented

or take place outside the claim set forth and the specific incidences arising as a consequence of the development of the process, because the process is intended to serve this claim of the parties or, once the complaint is answered, to serve the answer in justice to the issues formulated.

2°) Every judicial pronouncement must have its *juridical "ratio."* This requirement is certainly evident in c. 1611, 3°, when it requires that the judgment express the reasons or motives of law and fact on which the dispositive part is founded. But this same requirement, to base the dispositive part of the reasoned decrees on law and on the disputed and proven facts, is the reason why it is imperatively provided (*vim non habet*, according to c. 1617) that when decrees are not merely procedural, they must include, at least briefly, their reasoning.

This reasoning, which is its juridical reason, must also be present in merely procedural decrees, that is, the purely technical decrees and those that expedite, although they do not need to be reasoned. The express mandate that these decrees do not need to have an established basis, is not made because they could lack a juridical *ratio*, but because, due to the simplicity of the decree and its minor importance, only of a procedural nature, they find their *justification* directly in canon law itself, with which the initiation and the continuation of the procedure must comply at all times.

Reasonableness, especially valued in the *CIC* for custom (cf. c. 24), as indicated by doctrine, "implies that a customary norm should be in consonance not only with the principles of divine law, but also with what classical law referred to as 'the core of ecclesiastical discipline;' i.e., the essential elements of canonical control over the matter which custom serves to modify, complete, or qualify."[1] This doctrine is absolutely applicable to every judicial pronouncement, that, when issued for a given process and known subjects, and receiving the application of law in justice, must include this required rationale. This rationale belongs not only to the requirements of the canonical custom, but is also required for any type of pronouncement, inasmuch as, by being juridically binding on certain of the faithful, it must be made pursuant to said requirement of reasonableness.

3°) Every judicial pronouncement must have a *dispositive part* (cf., by analogy, cc. 1611, 3° and 1612 § 3, expressly referring to the judgment), in which an obligation is imposed, the occurrence of a given legal effect is declared, or at least a mere situation of fact or law is recognized, be it material or merely procedural, as a verification of something that has occurred previously. A judicial pronouncement is not understood to be the issuance of a mere opinion of the judge or tribunal, or as the practice of counselling or advisory work. The judicial organs issue juridically binding pronouncements for their recipients, and they must be clear, precise, set

1. P. LOMBARDÍA, commentary on c. 24, in *Pamplona Com.*

forth in that "dispositive part," such that the decree or judgment is imposed on the recipients, normally parties to the matter, but also even third parties, such as witnesses, experts, etc. They must know also what is required of them, and what the realities and obligations to which they are subjected are.

4°) Lastly, judicial pronouncements must be issued with *awareness of what the body is doing and freely.*

For juridical acts in general, cc. 125 and 126 establish a system of nullities and rescissions when their actors lack, for various reasons, those qualities characteristic of every act that allow them to be described as properly human, and with more reason, said requirements must be demanded for the juridical act. For the definitive judgment, the legislative requirement is even stronger, because all coercion exercised over the judicial organ, according to c. 1620, 3°, coming from force or grave fear, causes irremediable nullity. Equally reasonable, this sanctioning precept of nullity must affect the interlocutory sentence and every type of decree, whether or not it is reasoned in law.

The same does not apply, however, to ignorance or error in any statement, because these phenomena of defect, affecting the knowledge with which the judgment was pronounced and not the intent, are refutable. They are refutable not through remediable or irremediable nullity, (this latter could be the equivalent to rescission in some way), but through an appeal *restitutionis in integrum,* provided that, with manifest injustice, the objective circumstances of nos. 1°–3° of c. 1645 § 2 are present, which may result in the judicial body being found in ignorance or in error.

1607 **Causa iudiciali modo pertractata, si sit principalis, definitur a iudice per sententiam definitivam; si sit incidens, per sententiam interlocutoriam, firmo praescripto can. 1589 § 1.**

A principal case which has been dealt with in judicial fashion is decided by the judge by a definitive judgement. An incidental matter is decided by an interlocutory judgement, without prejudice to can. 1589 § 1.

SOURCES: c. 1868; *NSRR* 135 § 2; *PrM* 196 § 1; PAULUS PP. VI, Alloc., 8 febr. 1973 (*AAS* 65 [1973] 100–103)

CROSS REFERENCES: cc. 135 § 2, 1501–1502, 1504–1505, 1587, 1589 § 1, 1590 § 1, 1608 §§ 1,2 et 3, 1611,1° et 3°, 1612 § 3, 1617–1618, 1620,8°, 1639 § 1, 1668

COMMENTARY

Carmelo de Diego-Lora

1. All judicial pronouncements are *statements of will formally expressed by the judges or tribunals*, and for pronouncements of greater importance the *CIC* uses the word *judgment* (see introduction to tit. VII). This word is well-established in canonical tradition, of Roman origin, expressing a solemn pronouncement formulated by the judge, at the conclusion of the hearing of the case, regarding the object of the process, definitively resolving the issue presented to him by the litigant subjects, normally referred to as the *parties*.

The judgment is thus presented at the completion of the hearing of the case, and this is the final and definitive act by which the judge states his will that is binding on the parties, as well as the judge himselfwho pronounces regarding the object intended.

But, in turn, the judgment gives rise to another phase that follows, called the "execution of the judgment", which, in the canonical system has a predominantly administrative character. Before the judgment, the entire process has unfolded, beginning with the first act of initiative by which it is started. After the judgment, there are all the activities intended to put into effect the content of the statement of will of the judge, set forth in the form of a judgment.

The process is conceived in the *CIC* as an acknowledgment and final decision regarding an issue raised between the parties (c. 1502 uses the term *dispute*, although it might not exist if the respondent submits to the

claim of the petitioner, which attitude is referred to in procedural doctrine by the term a plea of "*nolo contendere*"), which *arises from a claim action by one subject with regard to another,* and which uses its effectiveness within a given juridical system. This claim is made *before abody especially instituted* to handle this type of claim. In the canonical system, these organs are those possessing juridical power in the Church and exercising it in accordance with the provisions of c. 135 § 2. Once the claim to an action is filed on the initiative of a subject having rights in this system (c. 1501), the judge must proceed to either admit or reject it (c. 1505), and this decision depends to a large extent on whether that claim to an action meets the requirements for the petition established in c. 1504.

If the judge admits the petition, the so-called period for presenting the case begins. All proceedings take place hereafter in connection with the central focus of the process, which is set forth in the formulation by the judge of the *dubium vel dubia* (c. 1513). Once the respondent has been notified of the process, whether or not they appear, any questions raised by the judge shall determine all the subsequent pleas by the parties, and all evidence proposed and presented. The same statement (or statements) of will contained in the judgment shall also be determined by the question (or questions) raised by the judge, who must respond to each of them (c. 1611, 1°).

2. These questions actually constitute the object of the process, but it is not an object and nothing more, rather, it is an object with a given juridical cause or causes, which define and model in a certain manner the very object of the process. As soon as the judge has admitted the claim of a party, we have a legally-based juridical act, and all the weight of the requirements of c. 1504, 2° pertains herein, and it is explained that c. 1505 § 2, 4° orders the judge to reject any claim that lacks a foundation. It is not enough to seek to have nullity of marriage be declared, but that claim must be based on one of the causes of nullity established by law. Although nullity of marriage is simply requested, c. 1677 § 3 provides that the various chapters, or juridical causes if nullity is requested, by which the validity of that marriage is challenged must be specified in the formulation of the doubt. For this same reason, art. 62 § 1 of the last organic and procedural Norms of the TRR,[1] improving the previous legal text and that of c. 1639 § 1, although only for causes of nullity of marriage, when it specifies the subject of the answer, states: *An constet de matrimonii nullitate in casu, additis capite vel capitibus*. And art. 58, in a general way, at the appeal stage states: *Ponens decretum de dubio vel dubiis disceptandis*.

The cause *petendi* rests in such a way on the *res* of litigation (that is, on what we here designate as the object of the process), determining it, that the issue of the congruence of the judgment, which when missing can

1. Cf. *AAS* 86 (1994), pp. 508–540.

make said judgment null (c. 1620, 8°), is closely linked not only to the object of the process, but to the cause or causes in the petition that serve as the basis. When considering the process, we move into the area of the rule of law, in which duly complying with the procedural forms entails guaranteeing the rights of the parties and objectivity and success in deciding the just solution. Justice requested through the act of the claim, through concrete petitions, must be reasoned in law in accordance with the alleged facts. Justice provided by the judgment equally requires this rational and juridical foundation (cc. 1611, 3° and 1612 § 3), which gives prestige, and provides authority to the pronouncements of the judgment.

On this question, the relevance of the cause *petendi* regarding the intended object is essential, which in procedural doctrine gave rise to two tendencies, fundamentally safeguarding the rights of the parties to the process and the congruence of the judgment. One of them is the so-called *doctrine of individualization*, by which, closely inspired by the Roman action, substantial stress is placed on the juridical cause of the petition, as the basis of the ruling. And, in contract thereto, the *doctrine of substantiation*, which, stated simply, could be said to emphasize the facts. These facts cannot be changed after the evidence, because the law has already been acknowledged by the judge, who had to apply it according to the principle *iura novit curia*. They were the facts alleged by the parties that were unknown by the judge and had to be made known and proven before him, and then this doctrine of the juridical maxim *narra mihi factum, dabo tibi ius* is applied. It can now be stated that both doctrinal positions have been interpreted within some limits of restraint, each being tempered, *especially* in the canonical system, by the prevalence of the aim to find the truth, which is what justifies the intention.

With respect to the *petitum* or *petita* of the petition, the judgment must be pronounced in favor of these petitions or acquit them, although the judgment may also be partly in favor of the petition and partly acquitting, according to the moral certainty acquired by the judge regarding the allegations and evidence (c. 1608 §§ 1 and 2). If that moral certainty is not reached regarding the petitions of the party making them, the judgment must be an acquittal (c. 1608 § 4).

3. Regarding the above, the judgment that, once heard or at least legitimately cited on the respondent (or respondents), resolves with its pronouncements (that are duly reasoned in law according to the proven facts), the requests of the petition, giving an answer to each of the questions formulated in the joinder of the issue, *is the definitive judgment*. It is defined in c. 1607: a formally expressed statement of will by the judge, by which he decides the case in chief.

If the judgment affirmatively answers those formally presented issues, agreeing to the prayers of the petition, which is where the claim is set forth, it is called an *admitting judgment*. If, on the other hand, the request is not admitted (c. 1608 § 4) it is designated a *rejecting or acquitting*

judgment. This is the first and most basic classification of the definitive judgments. At any of the instances at which these judgments are issued, the so-called *meritum causae* is judged, and all issues presented in the process are definitively decided. And the strength thereof determines the effectiveness of the *res iudicata*. The definitive judgment can also be, as we have already indicated, partially admitting if there were more than one question formulated in the *litis contestatio*, by which it will be acquitting with respect to those not admitted.

Totally or partially admitting judgments can be classified according to the content of the claims to which they respond affirmatively in *a*) *merely declarative judgments*, or statements of juridical verification, as they have sometimes been designated by procedural doctrine; *b*) *constitutive judgments*, inasmuch as they modify the previous juridical situations submitted to the process. These judgments, as their effect is to create new juridical phenomena and situations, modify them or terminate them, are called respectively,constitutive judgments of *juridical creation, modification, or termination*. Last, there are *conviction judgments*, when their pronouncements determine *obligations* (c. 1611, 2°) to be fulfilled by the losing party, which may be *giving, doing, or not doing something*.

4. As well as definitive judgments, c. 1607 introduces a second category, called *interlocutory judgments*, which take place when, in the handling of a case in chief, an incidental matter arises therein, and the judgment form is used.

One last phrase is added to this canon: *firma praescripto c. 1589 § 1*. This phrase was not found in the text of the first *schema*. It was added with the *placet* of all the consultors in the session of December 12, 1978.[2] It was the way of providing the new canon with a text that was in c. 1868 § 2 *CIC*/1917: *Ceterae iudicis pronuntiationes "decreta" vocantur*. Frankly, it did not seem very necessary to retain this last text in the new body of law, especially because this same text is stated in c. 1617. However, there was an attempt to introduce the reference to c. 1589 § 1, perhaps to avoid the belief, with only a reading of c. 1607, that all incidental causes would be resolved with interlocutory sentences, in contrast to the provisions of c. 1589 § 1, that, depending to their gravity, they should be resolved by judgment or by decree. In this way, the consultors avoided a potential ambiguity that could have led to a flagrant contradiction within the same Code. We believe that the correction was well-conceived, although perhaps not entirely necessary, especially taking into account not only c. 1617, but also c. 1618. In conclusion, it could be said that c. 1607 rather provides, in this second aspect, that *when an incidental cause is decided by a judgment, it is called an "interlocutory judgment."* Its formulation, in fact, has been made along the lines of the development of the

2. Cf. *Comm.* 1 (1979), p. 138.

case in chief, adapting to a very specific issue, that requires a differentiated resolution prior to the one that will resolve the case in chief (c. 1587).

Nonetheless, there are certain gray areas that should be pointed out. We must indicate that, in fact, the difference between a definitive judgment and an interlocutory judgment generally corresponds to the distinction and characteristics just indicated. Also, however, certain phenomena could arise with some complexity in these same resolutions, which may be described as of a *mixed nature*. They are phenomena such as those indicated by Della Rocca,[3] for example: the interlocutory judgment that has the force of a definitive judgment if it decides an incidental issue that allows the process and the positions of the parties to continue unchanged, but decides a matter that can later influence the decision adopted in the definitive judgment, as can occur with a denial of evidence. In addition there can be an interlocutory judgment that decides on the defects of the process that lead to the nullity of the proceedings, This can also occur with a judgment on an incidental issue arising from a claim intended to invalidate all the proceedings due to a lack of procedural requirements, if the claim is accepted.

From another point of view, it could be thought that (and in judicial practice this phenomenon often occurs), once the all proceedings are ended, the judgment is denying the request in the petition without any pronouncement on the *meritum causae*. It can happen that this type of decision is made because, at that time, formal defects, flaws, or deficiencies are found that would affect the nullity of the judgment or because the action taken suffers from defects in its exercise or in the configuration by which it was submitted, for which the judge is prevented from judging the issue of merit. Consequently, the pronouncement acquits the petition, but without the *res iudicata* being opposed to a new exercise of that action if it is presented with the necessary corrections.

Although the pure categories are found in a majority of cases, they are not necessarily found in all. In these gray areas, with insufficiently differentiated mixtures, we can also find that lack of distinction set forth in c. 1618 between interlocutory judgments with the force of a definitive judgment and decrees with the same effect. In any event, the possibility that one incidental cause can be resolved by an interlocutory judgment or by a decree, depending on the gravity that the judge must evaluate *a priori*, this evidences something that does not go unnoticed by doctrine. In fact, what really justly deserves the name judgment is the one that truly must be called the definitive judgment, that is, the one that decides the *meritum causae*. The other decisions adopted by the judge throughout the proceedings that do not resolve the case in chief, do not seem to deserve the name judgment, because of their minor importance in the procedural

3. F. DELLA ROCCA, *Instituciones de Derecho Procesal Canónico* (Buenos Aires 1950), pp. 304–305.

system. However, any objection like the foregoing can be discounted, because the designation of judicial decisions as judgments or as decrees is still a terminological matter, based on formal reasons of greater or lesser solemnity. In a certain way it is also positive canonical legislation, as any other, that has in its power the authority to use one term or another as it deems it appropriate.

The option favoring the interlocutory judgment in incidental matters of greater importance corresponds, however, in the positive text with the provisions of c. 1590 § 1, which provides that in these cases the incidental matter will be handled orally and decided by a judgment (c. 1668). With this, we find that the same legal text satisfies a consistent terminological requirement.

Lastly, it should be noted that this judgment, if it is pronounced in an oral hearing pursuant to c. 1668, will actually be a definitive judgment. With the norm of c. 1590 § 1, it turns out that there will be oral proceedings that end in definitive judgments, while other oral proceedings, which handle incidental matters, will end with interlocutory judgments.

Notwithstanding, it is worth recalling that the Code itself, from a formal point of view, has at all times intended that the rules for creating and drafting definitive judgments and for interlocutory judgments agree wherever possible (c. 1613). By maintaining, however, the concept of the interlocutory judgment, we believe that perhapsc. 1618 should not, with issues as important as those described therein, indiscriminately refer to interlocutory judgments and decrees (see commentary on c. 1618).

1608 **§ 1. Ad pronuntiationem cuiuslibet sententiae requiritur in iudicis animo moralis certitudo circa rem sententia definiendam.**

§ 2. Hanc certitudinem iudex haurire debet ex actis et probatis.

§ 3. Probationes autem aestimare iudex debet ex sua conscientia, firmis praescriptis legis de quarundam probationum efficacia.

§ 4. Iudex qui eam certitudinem adipisci non potuit, pronuntiet non constare de iure actoris et conventum absolutum dimittat, nisi agatur de causa iuris favore fruente, quo in casu pro ipsa pronuntiandum est.

§ 1. To give any judgement, the judge must have in his mind moral certainty about the matter to be decided in the judgement.

§ 2. The judge must derive this certainty from the acts and from the proofs.

§ 3. The judge must weigh the proofs in accordance with his conscience, with due regard for the provisions of law about the efficacy of certain proofs.

§ 4. A judge who cannot arrive at such certainty is to pronounce that the right of the plaintiff is not established and is to find for the respondent, except in a case which enjoys the favour of law, when he is to pronounce in its favour.

SOURCES: § 1: c. 1869; *PrM* 197; PIUS PP. XII, Alloc., 3 oct. 1941 (*AAS* 33 [1941] 421–426); PIUS PP. XII, Alloc., 1 oct. 1942 (*AAS* 34 [1942] 338–343); PIUS PP. XII, All, 5 dec. 1954 (*AAS* 47 [1955] 64); CPAC Rescr., 28 apr. 1970, 21; IOANNES PAULUS PP. II, Alloc., 4 feb. 1980, 4–6 (*AAS* 72 [1980] 174–176)
§ 2: c. 1869 § 2; *PrM* 197 § 2; PIUS PP. XII, Alloc., 5 dec. 1954 (*AAS* 47 [1955] 64); IOANNES PAULUS PP. II, Alloc., 4 feb. 1980, 5 (*AAS* 72 [1980] 175)
§ 3: c. 1869 § 3; *PrM* 197 § 3; PIUS PP. XII, Alloc., 5 dec. 1954 (*AAS* 47 [1955] 64); PIUS PP. XII, Alloc., 1 oct. 1942, 4 (*AAS* 34 [1942] 341–342)
§ 4: c. 1869 § 4; *PrM* 197 § 4; PIUS PP. XII, Alloc., 5 dec. 1954 (*AAS* 47 [1955] 64); IOANNES PAULUS PP. II, Alloc., 4 feb. 1980, 7–9 (*AAS* 72 [1980] 176–178)

CROSS REFERENCES: cc. 124 § 2, 1060, 1061 § 2, 1437, 1452, 1462 § 2, 1463, 1472, 1494–1495, 1502, 1504,1°, 1526, 1527 § 1, 1536, 1541, 1572–1573, 1579 § 2, 1585, 1592, 1642 § 2, 1660, 1664

COMMENTARY

Carmelo de Diego-Lora

I. MORAL CERTAINTY OF THE JUDGE

1. Paragraphs 1 and 2 of the canon refer expressly to moral certainty. In the first place § 1 tells us that the judge must possess this moral certainty. And he must have it at the culminating point of issuing the decision on the object of the process, dependant on the cause of action. And he must express it in the form of a judgment.

Upon observation of § 4, we can see, in turn, that this moral certainty is *necessary when it is a judgment for the petitioner.* In §§ 1 and 2, although they do not expressly mention it, are considerations of the judgment that affirmatively answers the questions formulated in the joinder of issues, which usually results from the requests expressed by the petitioner in his plea.

However, that moral certainty will likewise be required in the mind of the judge if he agrees with the counterclaim of the respondent, even when the respondent in his defense alleges peremptory exceptions based on facts requiring an answer from the judge (see introduction to part I, tit. V, *De actionibus et exceptionibus*; and its chap. I, *De actionibus et exceptionibus in genere*; see also commentary on cc. 1462 § 2 and 1491). The procedure for a possible answer by the petitioner to the exceptions from the respondent, controlled by c. 1660, is significant in this regard. In fact, at times one can foresee the possibility of judgments of dismissal, not due to a lack of moral certainty regarding the claims by the plaintiff pursuant to the situation described in § 4 of c. 1608, but because the judge acquired moral certainty with respect to the facts that the respondent used as the suppositions on which he based the exception.

Except for the case of possible judgments for the respondent by virtue of moral certainty regarding the truth of the factual suppositions on which the alleged exception by the respondent is based (as may occur, for example, if the payment exception, the statute of limitations exception, the adjudged matter exception, etc., is alleged and proven), usually the moral certainty of the judge is required for the judgment for the petitioner of that (the *quid petitur* of c. 1504, 1°) which the plaintiff claimed in his complaint or the respondent claimed in the counterclaim, if it was duly established (cc. 1494–1495 and 1463).

In fact, it is the statements of the parties that must influence the formulation of the *dubium,* because these statements are transformed into concrete pleas. And those statements will require proper evidence (c. 1526 § 1) in order for the judge to acquire the necessary moral certainty

regarding them to correctly pronounce the judgment. Thus it is explained that c. 1608 § 2 provides that the judge must acquire moral certainty regarding what is presented and proven. The allegations must be understood, for the purposes of evidence, as statements made by the parties, given that, as procedural doctrine acknowledges, negative facts are incapable of being proven, unless affirmative facts to the contrary are alleged, supporting the denial, in which case, said contrary affirmative facts must also be proven. We cannot take more time on this subject here, which belongs to the study of proofs.

2. Therefore, those alleged and proven facts are the sources of moral certainty that the judge must obtain when pronouncing the judgment. It is with reason that every procedural system begins with the allegations phase, (or the introduction of the case, as stated in canonical procedural terminology), which is followed, in its progress toward the judgment, by another phase or period of the offer and presentation of evidence. However, it is possible that this may not occur, although this is not very common. This evidentiary phase will not occur, because at those times the object of litigation can be based solely on juridical declarations, on the application and interpretation of law, which alone give rise to the dispute (c. 1502). In this case, the only source of the moral certainty will be the law, be it natural or positive , mainly canonical, its validity and application for the specific case, and also the problems of precedence of conflicting legal sources, and (not wanting to exhaust these possibilities), any issues arising on the interpretation of legislative texts. These matters will be presented in the process normally through the allegations of the parties, which will be formulated in the phase introducing the case, and will be elaborated at the end, immediately prior to the judgment, in the closing arguments.

In our opinion, when c. 1608 § 2 sets forth the principle that moral certainty will be obtained by the judge on what is brought forward and proven, what it is affirming is his obligatory reference to what is brought forward and proven in the process itself in which the judgment must be pronounced. But at the same time, it imperatively excludes, as a source of moral certainty, any personal knowledge that the judge may acquire through means of information not confirmed in the process. If the judge wishes to obtain more information than that presented by the parties to the litigation, the *CIC* grants him the power to order evidence ex officio, pursuant to the provisions of c. 1452. In order for this evidence to influence the moral certainty, it must be presented and confirmed under legal authority in the process (c. 1437), and this is required for the ordinary written process (c. 1472) as well as for the oral contentious trial (c. 1664).

3. Paragraphs 1 and 2 of the canon require moral certainty of the judge for him to pronounce judgment, at the same time that they provide for those sources from which that certainty must come. They do not, however, attempt to define moral certainty. We will now discuss the manner of knowing what this required moral certainty is.

It must be understood that the moral certainty that the judge must obtain, as expressed by the very term, is certainly not a type of physical or metaphysical certainty, nor can it be confused with mere probability, or, as one procedural expert has indicated, mere psychological conviction, It must, rather, be supported by rules of logic and ethics, always starting from those objective data that are the claims of the parties and the evidence contributed to the process, be it at the initiative of the parties, or ex officio by the judge, and supported thereon. That moral certainty cannot, nonetheless, cease to be, as stated by Cabreros de Anta "a subjective state of mind."[1] It is shown also to be an intellectual conviction of what is objective and is deemed to be true, but it does not cease to be an estimation and, as indicated by Cardinal Lega, *non est absoluta et perfecta sed relativa, pro subjecta materia excludens probabilitatem erroris* ("is not absolute and perfect, but relative, excluding the probability of error from the matter under discussion").[2] To our understanding, that subjective mental attitude, that relative (and only relative) possibility of the truth that the judge must achieve, must always be corroborated, at least in each of its decisive declarations, by objective data confirmed in the proceedings, coming from allegations of the parties and objective evidence incorporated into said proceedings.

One very rigid interpretation of the principle of *favor matrimonii*, along the lines of art. 171 and art. 172 of the *PrM*, even led to the claim, by a sector of canonical doctrine, that it would be sufficient if there were only one reasonable argument or doubt, supported on a probable basis, for the judge to find for the validity of the marriage, although there were ten arguments indicating otherwise.

In view of this uncertainty, because there were still conflicting doctrinal opinions, Pius XII alluded, in his speeches to the TRR on two successive occasions, to the issue of moral certainty.[3] In sum, it might be believed that in the doctrine of the Pontiff, *moral certainty* has *a positive part* that excludes all reasonable doubt, which essentially distinguishes it from quasi-certainty, and a *negative part*, which allows the possibility of its opposite, with which it differs from absolute certainty. At times it can result from a multitude of indications and demonstrations that, each taken and assessed alone, cannot establish true certainty, *and only taken as a whole* prevent any reasonable doubt from arising in a man of sound mind. Therefore, it must not be a subjective certainty, based on instinct, or on mere opinion, or on personal credibility, rather, it must be an objective *certainty*, that is, *based* on *objective reasons* regarding the reality of the fact. In this way one would depart from the risk of excessive subjectivity

1. S. ALONSO MORÁN-M. CABREROS DE ANTA, *Comentarios al Código de Derecho Canónico*, III (Madrid 1964), p. 612.
2. M. Card. LEGA,*Comentarius in Iudicia ecclesiastica*, II (Rome 1950), p. 934.
3. Cf. PIUS XII, Alloc., October 3, 1941, in *AAS* 33 (1941), pp. 421–426; Alloc., October 1, 1942, in *AAS* 34 (1942), pp. 338–343.

in the formation of a value judgment. Therefore, the objective concept of moral certainty must always have as its basis a sure judgment, excluding all reasonable doubt.

The doctrine of Pius XII also managed to consider that moral certainty admits various degrees. By this it is understood, first, that the judge must be sure that he really has moral and objective certainty, such that any reasonable doubt against the truth of the fact is excluded. Then, once this certainty is acquired and achieved, normally any higher degree of certainty is not sought, unless so demanded by the provisions of law in view of the seriousness of the norm.

Thus, moral certainty is seen as an indeterminate judicial concept that the judge in his wisdom must specify in each situation, taking into account, first, the objective data incorporated into the process, either in the form of allegations or of objective evidence. Second, there must be a degree of conviction such that with this objective data the judge could be said to acquire awareness of the objective truth in litigation, but which does not necessarily have to exclude a conclusion to the contrary. Last, an assessment must be made of that contrary possibility, according to whether or not it is supported by objective information. If not, it could be mere fear of making a mistake, personal impressions, definitively the burden of uncertainty that can weigh on decisions subjected to the risk of uncertainty coming merely from human discretion.

Undoubtedly, if the doubt comes to be supported by objective data such as certain evidence as a whole, or conclusive proofs, a certain conclusive proof or a certain agreement of indications favoring that doubt, it is possible to understand that conviction of the truth assessed by the judge will not deserve to be deemed reasonable. *Prudentia iudicis*, however, in each case, would have to face the risk of possible error, if the truth declared has good logical, probative reasons not offset by others having at least the same or approximate value. Returning to pontifical doctrine, the judge must seek to make certain of the fact, such that what is a guarantee of the truth does not become, simultaneously, an impediment to achieving it.

II. Evaluation of the Proof

1. The canon not only states that moral certainty is achieved by the judge through that which has been set forth and proven in the process, but also § 3 gives us the criteria that must be used in this evaluation of the proof.

By relating moral certainty to proof, the canon is referring to moral certainty regarding the facts set forth in the process and to the proof of those facts. This commentary is not the place to set forth the doctrine of

proof, the object submitted to proof, or the means of proof, which already have their own place. It is enough to note for now that the instrument of proof hardly places us before the same thing that must be proven. The means of proof, even direct proof, only allows us an approximation to that *res* that must be known by the judge with certainty for him to find for the petitioner. Sometimes this is because the proof is of a critical nature, such as expert evidence or that of presumptions. Other times, it is because, although they represent a historic fact which is presented to the discernment of the judge, they *are* not the same thing that must be proven, but versions thereof, be they produced in a written form such as documentary evidence, or orally, by the interested parties themselves (in the cases of confessions and all other types of declarations by the parties), or by third parties outside the interests of the parties, as occurs with evidence from witnesses. At times they may retain material traces of the occurrence, for judicial recognition, but they are not identical to the act itself that occurred.

Therefore, all proof that is presented in the process tends toward making the judge achieve moral certainty regarding the facts that supposedly serve to describe the object of the litigation, but only to the extent that the appraising faculty of the judge weighs them, regarding their authenticity, their accuracy, their authority as representation or as critical evaluations, according to the case. This critical, intellectual activity of the judge, with regard to the proof, is what is usually called the "evaluation of the proof."

This special task, characterized by the evaluation of the judge regarding the means of proof, and the result of judicial conviction regarding the truth, born by these means of proof, are not always left to the sole discretion of the judge in the various procedural systems. The legislator may also present, from positive law, his own evaluations regarding the means of proof that it offers, and among them he can deem some as having greater authority, or higher guarantees than others, thus showing the reliability or lack thereof that those various means of proof have for positive law as accurate evidence of the truth of the facts that the parties want to be known when judgment is pronounced.

Canon 1608 § 3 gives a good account of this latter action. It first refers to evaluation according to the conscience of the judge himself, and then it refers to the norms on the effectiveness of proof contained in the provisions of canon law.

2. In principle, it could be said that the canonical evidentiary system is not what is usually called by procedural doctrine the "legal list" system of evidence. Although throughout the entire tit. IV of sec. I (book VII, part II), entitled *De probationibus*, certain means or instruments of proof are regulated, these are not the only reliable means in the canonical procedural system. Canon 1527 § 1 establishes a broader norm when providing that any proof may be brought to the process as long as it is useful for the

litigation of the case, and they are legitimate, that is, in accordance with the letter and spirit of the canonical system.

However, repeated legal evaluations of proof are found in the *CIC*. This occurs, especially, together with other minor evaluations, in c. 1536 for the judicial confession and other declarations by the parties; in c. 1541 for public documents; for the witnesses themselves, in spite of the complexity of this evidence, and the lack of reliability now arising in this respect at this time, criteria for evaluation are given in cc. 1572 and 1573, although they are less rigorous in their effectiveness than the foregoing, and, lastly, the *iuris* presumption usually entails a favorable juridical evaluation regarding its efficacy (c. 1585).

The canons just cited, some of which are binding with regard to the evaluation judgment they present, are provisions of a system for the legal evaluation of evidence, of Germanic origin, fundamentally inspired by experience and the desire to introduce from the beginning, into juridical relationships, the ideal that juridical operators can act with the certainty of the results they seek to achieve when they utilize certain evidentiary instruments. Thus there is an attempt to avoid contradictions in evaluation of the proof by the various judges, offering them some legal criteria that everyone must adopt.

Canon 1608 provides, however, that the judge must evaluate the evidence according to his conscience, by which it seems that the canonical provision gives preference over the system of legal evaluation to what is called the system of free appraisal of evidence. This has a Roman-classical basis, is realistic, inspired by logical criteria of legal reason that demand that each case be resolved by the judge freely and independently of other cases, such that the solution may be different in view of the justice of each specific case. This system stresses the prominence and the prestige of the office of the judge, the uniqueness of each case, and it is based on the idea that the legal world cannot, with its norms, embrace the enormous complexity of life. At times, *the overall evaluation of proof* can offer the conscience of the judge a stronger certainty concerning each individual item of proof, regardless of how supported it is by legal evaluation. Moreover, the indications themselves, together with other instrumental means of proof, can acquire great evidentiary effectiveness.[4]

On a previous occasion, when studying issues related to evidence,[5] we wondered how to solve the conflict, if it arises, between appraisal in conscience by the judge himself and appraisal of the proof according to law. With more reason, this conflict intensifies when it is noted that c. 1608 § 1 requires that moral certainty be achieved by the judge himself:

4. Cf. L. DEL AMO, *La clave probatoria en los procesos matrimoniales (indicios y circunstancias)* (Pamplona 1978).
5. Cf. C. DE DIEGO-LORA, "La apreciación de las pruebas de documentos y confesión judicial en el proceso de nulidad de matrimonio," in *Ius Canonicum* 7 (1967), pp. 529–573.

requiritur in iudicis animo moralis certitudo circa rem sententia definiendam; and § 2 says: *Hanc certitudinem iudex haurire debet ex actis et probatis.*

On the occasion to which we just referred, we decided, supported by doctrine and jurisprudence, in favor of the freedom of judgment of the judge, for the purpose of proposing more discretion for him, in order that the moral certainty of whoever is judging in conscience not be distorted by the imposition of evidentiary analysis made by law, as if the judgment were the work of the legislator and not of the judge. This could make it seem as if the judge were only an instrument for the mechanical application of positive law and not the author and person responsible for the justice that the judgment, albeit subject to law, requires for each specific case.

Therefore, we understand that the legal criteria of evaluation of the proof, that appear in the letter of the law as binding, are not really anything more than guidelines that should be taken into account, given that they are the result of juridical experience, and they are offered by the legislator as assistance and collaboration to the judge when he is pronouncing judgment. However, under no circumstances should they restrict or force his conscience to the extent that the judge could come to a position where he did not consider the judgment as his own, but rather the fruit of the law, which is what imposes the evaluation criteria.

Consequently, these legal rules should serve as guidelines and working material provided by the legislator, which is why the judge must take them into account when pronouncing the judgment. The judge must either rely on them completely, if the moral certainty that in conscience he acquires regarding the facts in dispute coincides with the sources of certainty provided by the legal evaluation of evidence, or not follow them, in which case the judge must, in the reasoning of the judgment, show the reasons that have led him not to follow the established criteria of legal evaluation in the given case.

In the new *CIC*, there is a very significant provision, which is c. 1579 § 2, a repetition of c. 804 of the *CIC*/1917, which is intended for the judge in connection with expert evidence. This paragraph provides that when stating the reasons for his decision, the judge must state for the record the reasons for acceptance or rejection of the conclusions of the experts. This criterion definitely deserves to be also taken into account, in every judgment, when the judge is setting forth his evaluation of the evidence for the purposes of justifying how he achieved the moral certainty that led him to pronounce the judgment in a given way. In his grounds, the judge will explain the reasons that have led him with a clear conscience to follow the legal criteria of evidentiary evaluation, or, if applicable, the reasons that have led him to apply what we could call "judicial discretion" justifying overlooking the *legis* criterion, substituted or conditioned by the *hominis* criterion, at the discretion of the judge.

Knowing how to explain the reasons justifying not following the legal criteria in a given case, thus affirming the freedom of judgment with a clear conscience of the judge, shows the value that *epieikeia* must have in a given situation, and in turn asserts the strictly judicial nature of the judgment, the relevant function of the exercise of the *potestas judicialis* in the Church. In this way, respect for the law is preserved, as shown in the reasoned explanation, but at the same time it highlights the honor deserved by the conscience of the judge, who is the true author of that norm in the concrete case that is the judgment. In the end, he is the one who must achieve moral certainty and judge if, according to human wisdom, there are reasons to the contrary, such that the instrumental law of the evaluation of evidence does not apply in the specific case, precisely, in the service of justice what has been taken into account when the judgment is formally pronounced.

III. Sentence of dismissal

1. Although § 4 provides that if the judge does not achieve moral certainty that the right of the petitioner is according to law, *conventum absolutum dimittat,* the concept of a sentence of dismissal has a more general scope than the sentence of acquittal.

It absolves the person from those obligations that the claim of the petitioner wishes to impose on him with his claim, and this in fact occurs when the petitioner files with the judge a claim for a penalty on the respondent. But this acquittal of the respondent does not occur in sentences with claims that were merely declarative or constitutive, that is, when the petitioner does not seek to have the respondent give or pay something owing; to do something, to adopt some conduct; or to refrain from assuming some conduct that has not yet been adopted although it was the intent, or to continue with the conduct that had been adopted and that should be abandoned as a result of the judgment.

Therefore, when the claim of the petitioner is not accepted, *all sentences are included within the terms "sentence of dismissal,"* however, not all can be called "acquittals," although they also do not accept what is claimed. This last phrase particularly contemplates the respondent with regard to the petitioner's claim, when this claim is for a penalty. The term dismissal, on the other hand, contemplates the judgment, not from the respondent, but from the petitioner's position when his claim is not satisfied, regardless of its content, thus its broader scope. Therefore, rather than speaking of the acquittal of the respondent, which is what § 4 does, in practice, it is usually the acquittal of the claim that is referred to, transferring to the claim the expression that truly referred to the respondent in penalty judgments.

With this explanation, we would like to make it clear that the legal text has personalized in a very noticeable way the issue of the judgment that acquits the claim, because the judge does not reach the necessary moral certainty that would allow him to agree to the requests contained in the petitioner's claim. In this way § 4 stresses the idea of a conflict, in the *litis* set forth between the parties, when in fact that lack of moral certainty to agree to what is claimed can occur outside of the conflict, without the respondent having appeared on the record and with his being declared absent (c. 1592). And it can even occur if he has appeared in the proceedings and does not object or he capitulates, but the judge(inasmuch as they are matters related to the public law of the Church, or due to fear of fraud as a result of complicity between the parties), finds that what is claimed must be proven (cc. 1452 and 1526 § 2, 1°).

In fact, as we have seen, the lack of necessary moral certainty in the mind of the judge given as a reason why he pronounces a sentence of dismissal is directly related to the very claim of the petitioner, not to the favorable situation that said dismissal would create for the respondent.

The preceding statement must lead us to another issue raised by § 4 of the canon. In it, the lack of moral certainty in the mind of the judge is presented in connection with the right of the petitioner. On this point, the canon supports the wording of c. 1491: if an action has been exercised, it is because there is a prior right. This right, then, will be the one that has to be proven in the process and, if there is a finding for the petitioner, it will be because the judge acquired moral certainty according to what is brought forth and proven. If he has not achieved it, the sentence will be a dismissal.

However, the action, because it justifies the process and the judgment, does not in every case arise from a prior right of the subject exercising it, which would justify its exercise. It can arise from that right, but it can also occur that the right, the protection of which is being sought, does not deserve the juridical protection of the action, or that the action originates directly from situations in which an injustice is suffered and the subject suffering it deserves to be granted the power to act before the judicial organs, seeking the protection that they give him. That is, a procedural right should not be confused with procedural action or the right to claim justice before the courts (for a more extensive explanation of the subject, see the introduction to tit. V, *De actionibus et exceptionibus*, and the commentary on c. 1491).

2. The question that we really have to finally ask has to do with the object on which the judge must achieve moral certainty in order to find for the petitioner.

Moral certainty does not concern only the facts that serve as the assumption for the exercise of the action, although that certainty must be incorporated into all of the knowledge that the judge must acquire on the object of the litigation.

According to the wording and order of the various paragraphs of c. 1608, what is said in §§ 2 and 3 seems to infer that the moral certainty of the judge only rests on the factual elements that need to be proven for the finding to be for the petitioner, such that, when this certainty is not reached in their regard, by exclusion, the ruling must be for the respondent, and the respondent will be absolved of the complaint. But not every process revolves around evidence, there may be processes in which no proof is needed. The object of the litigation, which always includes consideration of the *causa petendi*, possesses a dimension higher than the evidence of the facts. When c. 1608 § 2 provides that the judge will acquire moral certainty *ex actis et probatis* (§ 2), from a certain point of view, as already indicated, it is demanding that the judge, in order to issue the judgment that must be expressed in the ruling, rely only on what is in the judicial records, either as allegations or as evidence, excluding from said judgment what may be personal information for him. From another point of view, however, it is indicated that everything found in those the acts of the case, and in the evidence presented, must be elements that come together therein as sources of moral certainty that must be achieved for a finding for the petitioner to be pronounced. Yet § 3 does refer only to the facts, by alluding solely to the evidence when establishing a criterion for its evaluation.

Therefore, everything found in the acts, and not only what is related to the evidence, will be useful to the judge in achieving moral certainty. But even more so, inasmuch as § 1 of the canon directly focuses the object on the fact that moral certainty must be obtained: *circa rem sententia definiendam*. This means that, all the object of the process in connection with their causes and some parties, (certain subjects that are in the acts as the petitioner and the respondent), that, together with the competence of the organ, provide the judge with the framework in which he must pronounce his judgment, consisting of all those personal, real, and causal elements on which the judgment must be pronounced.

What has just been said is also evident in § 4 of the canon when it provides that, if moral certainty is not reached regarding the right of the petitioner, the respondent must be absolved, unless it is a cause enjoying the favor of law, because in this case the judge must rule in favor of the favorable cause: *nisi agatur de causa iuris favore fruente*. That is, there is no mention of evidence favored by law, such as the judicial confession or public documents can be, but it refers to the cause enjoying the favor of law, that is, the causally focused juridical object favored by the law. It does not cease being a provision that, in the procedural realm, is pronounced in accordance with given juridical acts in which, for example, the correctness of their external formal appearance is sufficient, if not proven otherwise, in order to affirm their validity. This occurs with what is generally provided for the juridical act in c. 124 § 2, or what is also provided in favor of marriage in cc. 1060 and 1061 § 2. The provisions of c. 1608 § 4, in these instances, favor the case as a whole and not only particular aspects thereof.

Therefore, the moral certainty of the judge will be acquired starting from the proven facts, if there is evidence, as found in the judicial proceedings. If, moreover, that moral certainty is acquired regarding the facts, it will be necessary to ascertain if the law presented, as found in the acts, is relevant to those facts. It must be verified if, in the specific litigation, as presented by the petitioner and as the respondent has contradicted it, there is what modern procedural doctrine has called *subsumption,* that is, if the hypothesis that factually justifies the process itself is subsumed in the hypothesis that generally is found in the positive norms presented by the parties. Not only will this verification have to take place, but it will also have to be proven whether the effects sought are established in law. Moreover, said verification must discuss the exceptions set forth by the respondent, or those that the judge himself ex officio has incorporated into the process, such as, for example, the adjudged matter defense (c. 1642 § 2).

In conclusion, the moral certainty that the judge must acquire in order to find for the petitioner extends to all elements of the process, on which the judge must issue a favorable opinion before pronouncing that judgment for the petitioner. He will also have to first reject all those elements of fact and of law in the process that are opposed to the judgment for the petitioner, either because he does not acquire moral certainty favorable to said aspects of the opposition or because the moral certainty required is contrary to the elements of opposition set forth.

IV. METHODOLOGICAL ORDER SO AS TO ACHIEVE MORAL CERTAINTY

It is now the time to try to define the scope of the object regarding which the judge must acquire moral certainty when pronouncing a judgment in favor of the petitioner, affirming that *it is the same object on which said judgment is pronounced,* (excepting the formal requirements therefor). Moral certainty, therefore, is closely related to the method to be followed in order to achieve it. And this method is none other than that which procedural doctrine indicates as most appropriate for developing the judgment.

In this field, procedural doctrine uses a key work by the Italian procedural law expert, Calamandrei.[6] His doctrine, to our understanding, is as applicable to civil judgments as to canonical judgments. The first thing that must be verified (we would say: *the first thing on which moral*

6. Cf. P. CALAMANDREI, "La génesis lógica de la sentencia," in idem, *Estudios sobre el proceso civil* (Buenos Aires 1945), pp. 369–417.

certainty must be acquired), is whether the intended juridical effect, based on the juridical norms presented, is in accordance with law. If the answer is no, there is no need to go into a consideration of the proof, because a sentence of dismissal is imposed by the force of that unduly sought juridical effect. Additionally, it will be necessary to then verify the juridical value of any exceptions that may impede, annul, or render ineffective said juridical effects.

If, however, the intended legal effect or effects are in accordance with law, it will be possible to go into that comparison of the facts set forth by the parties, which determine the cause of action, with the factual situation or situations abstractly described in juridical norms. This is the juridical operation that formerly was referred to by the term *subsumption*. Here evaluations will come into play that are often related to indeterminate juridical concepts, for example, culpability, diligence, good or bad faith, fraudulent intent, and so forth.

Only when that all-encompassing agreement of the legally-defined facts with confirmed acts is noted, will it be appropriate to go into a study and evaluation of the proof in order to acquire that moral certainty regarding the asserted facts, measure the stature of those facts, etc., which will allow the intended juridical effect to take place, or, lead to the opinion that the required conditions as a whole are not met for said juridical effect to take place.

According to the *dubia* that were defined in the joinder of the issue, there can also be among them an order of priorities, for example, when one cannot go into a given question without having resolved another that serves as a precedent. All of this requires a logical order that must be taken into account throughout the judge's investigation in order for a precise opinion to be formed for the judgment to be pronounced.

Only after exhausting this course, schematically set forth herein, will the judge give the appropriate answers, once he has favorably managed to reach the various landmarks in which moral certainty occurs, that will guarantee him, with a clear conscience, the correctness of his judgment with respect to law and to facts supporting the petitioner's claim. This method is also valid for acquiring moral certainty in favor of the respondent's counterclaim and even in issuing a judgment in favor of any peremptory exceptions that may be filed by the respondent in his defense, using facts impeding, excluding, or extinguishing the action or actions exercised by the petitioner.

At times, the judge could feel tempted to rule directly from the facts, going into the evidence, following an order that is the reverse of that indicated for reaching the necessary moral certainty. But if he does not first have the exact juridical coverage such that those formulated requests are known to be supported by law, there is a risk that in the long run this method will be useless, because the process is not merely an instrumental

system for verifying factual truths, but mainly consists of the determination of judicial effects. Those effects can come from proven facts, but this task of investigating the facts is still last, after we know that the intended legal effect is worthy of being recognized as set forth in the parties' statements.

Beginning with a study of the proof can also affect the judgment, by deeming the law reducible once and for all to the moral certainty that was already acquired *a priori* from the adduced facts. It could be feared that the judge will obtain through intuition what only appropriate juridical verification can offer him, and that the obligation to adhere to the law and justice in this way ends up subservient to what the known and procedurally-verified facts seem to require as more appropriate for the justness of the decision. It is necessary to avoid the danger that the judicial function may come to be confused with a mere investigation of the solution to the *quaestio facti*, as an inquisitive investigation of the truth, without first reflecting on the importance of the *quaestio iuris*. The judge must acquire moral certainty regarding the factual truth, but within the framework of the sphere of significance and juridical importance, which legitimizes the proper investigation by the judge and gives to the certainties that he will achieve the prestigious hallmark of those acquired through law, at the same time that it serves law as a source of justice and equity in society.

Lastly, we should stress the relevant role that all sections of this c. 1608 play in canonical justice, given that moral certainty required for a finding for the petitioner is a guarantee, for the judgment itself, of its subjection and fidelity to canonical system. At the same time, its observance, sets forth the truth of the realities that the judge must formulate binding pronouncements upon.

1609 **§ 1. In tribunali collegiali, qua die et hora iudices ad deliberandum conveniant, collegii praeses statuat, et nisi peculiaris causa aliud suadeat, in ipsa tribunalis sede conventus habeatur.**

§ 2. Assignata conventui die, singuli iudices scriptas afferant conclusiones suas in merito causae, et rationes tam in iure quam in facto, quibus ad conclusionem suam venerint; quae conclusiones actis causae adiungantur, secreto servandae.

§ 3. Post divini Nominis invocationem, prolatis ex ordine singulorum conclusionibus secundum praecedentiam, ita tamen ut semper a causae ponente seu relatore initium fiat, habeatur discussio sub tribunalis praesidis ductu, praesertim ut constabiliatur quid statuendum sit in parte dispositiva sententiae.

§ 4. In discussione autem fas unicuique est a pristina sua conclusione recedere. Iudex vero qui ad decisionem aliorum accedere noluit, exigere potest ut, si fiat appellatio, suae conclusiones ad tribunal superius transmittantur.

§ 5. Quod si iudices in prima discussione ad sententiam devenire aut nolint aut nequeant, differri poterit decisio ad novum conventum, non tamen ultra hebdomadam, nisi ad normam can. 1600 complenda sit causae instructio.

§ 1. The presiding judge of a collegiate tribunal decides the day and time when it is to meet for discussion. Unless a special reason requires otherwise, the meeting is to be at the tribunal office.

§ 2. On the day appointed for the meeting, the individual judges are to bring their written conclusions on the merits of the case, with the reasons in law and in fact for reaching their conclusions. These conclusions are to be added to the acts of the case and to be kept in secrecy.

§ 3. Having invoked the divine Name, they are to offer their conclusions in order, beginning always with the *ponens* or *relator* in the case, and then in order of precedence. Under the chairmanship of the presiding judge, they are to hold their discussion principally with a view to establishing what is to be stated in the dispositive part of the judgement.

§ 4. In the discussion, each one is permitted to depart from an original conclusion. A judge who does not wish to accede to the decision of the others can demand that, if there is an appeal, his or her conclusions be forwarded to the higher tribunal.

§ 5. If the judges do not wish, or are unable, to reach a decision in the first discussion, they can defer their decision to another meeting, but not beyond one week, unless the instruction of the case has to be completed in accordance with can. 1600.

SOURCES: § 1: c. 1871 § 1; *NSRR* 135 § 1; *PrM* 198 § 1
§ 2: c. 1871 § 2; *NSRR* 136 § 1; *PrM* 198 § 2
§ 3: c. 1871 § 3; *NSRR* 137, 142 § 1; *PrM* 198 §§ 3 et 6; *SNAS* 120–122 § 1
§ 4: c. 1871 § 4; *NSRR* 138, 143 § 4; *PrM* 198 § 4, 203 §§ 1 et 2
§ 5: c. 1871 § 5; *NSRR* 140, 141; *PrM* 198 § 5; *SNAS* 122 § 1

CROSS REFERENCES: cc. 18, 202 § 1, 203 § 1, 1426 § 1, 1429, 1453–1457, 1468, 1469 § 1, 1600–1607, 1610 § 2, 1611 3°

COMMENTARY

Carmelo de Diego-Lora

1. The various paragraphs of the canon specify simple norms of internal procedure that must be followed by the judges, specifically those making up the collegiate tribunal, in order to adopt the appropriate decision and develop all the parts of the judgment.

Following these norms of internal procedure has no other control than that which arises from the fact that it is a collegiate tribunal. Several judges, therefore, each of them responsible for reaching a judgment in accordance with the requirements of procedural law, even if the function of presiding and moderating these sessions only devolves upon the presiding judge, meet in the same act, prior to, and necessary for, the issuance of the judgment. This competence must be understood to be compatible with the fact that each judge retains their own responsibility in the exercise of their judicial function, although, in these cases, this function is shared by the judges of the tribunal, which does not relieve each of them from their requirements and responsibilities pursuant to cc. 1453–1457. These canons reflect on the judge, each judge, with respect to discipline as well as to criminal liability, should he or she commit any criminal act.

Therefore, the judgment of the tribunal, which, although it is produced in a collegial act, governed by the principle of majority vote if there is no unanimity, (c. 1426 § 1) does not eclipse the personal responsibility that devolves upon each in the proposal and discussion of the judgment, as well as the scope and content with which the decision is pronounced.

This attribution of individual responsibility to each judge perfectly explains §§ 2 and 4 of the canon: § 2 imposes on each of the judges the duty to present to the other members of the college a type of draft judgment, the fruit of his or her reflection and personal study of the record of the proceedings, and § 4 allows and legally authorizes the specific vote of the dissenting judge to be sent to the court of appeals. In this situation, the personal responsibility and discretion of the judges outweigh the prominence of the court. This prominence could end up favoring the anonymity and, even in a certain way, dilute responsibility when the judge is inclined to agree with his or her fellow judges for the sole purpose of not having his or her opinion of the case appear to be in conflict with the majority vote.

This innovation was incorporated into c. 267 of the original *Schema* (now c. 1609), as a result of an initiative that arose in connection with the following canon, 268 (now c. 1610). The intent was to add to § 2 the provision that the judgment as well as the votes and conclusions of the dissenting judges would be sent to the court of appeals, when applicable. At that meeting, held on December 12, 1978,[1] the *relator* was vigorously opposed to this general way of sending (applicable to every contrary vote), proposing, on the other hand, that a second paragraph be added the then c. 267 § 4, as drafted, which, except for an amended particle in the final draft, coincides completely with the present c. 1609 § 4. The opinion of the *relator* received everyone's *placet*. And with that, it turned out that the dissenting vote would not have to be sent up, but that member of the court would have the right to have their opinion, formally expressed within the limited sphere of the court, also heard by the court of appeals in the case of an appeal.

2. The procedure to be followed as established by the canon is essentially a repetition of the provisions of c. 1871 of the *CIC*/1917 and, for better implementation thereof, art. 198 of *PrM*. What appears as an innovation is in fact the provision of this second paragraph of § 4 of c. 1609, which highlights the fact that the independent discretion of the dissenting judge should be retained, as well as the possibility that he can demand that his own conclusions be sent to the higher court in the event of an appeal.

The procedure for the court to come to decide a case, which must be set forth in the judgment, shall be as follows:

a) Once the ordinary process has covered all the procedural formalities, after the conclusion of the case, be it in accordance with the procedural formalities for the pleadings and observations in cc. 1601–1605 or, because any of the circumstances and following formalities provided in c. 1606 took place, the proceedings are pending the issuance by the tribunal of the final judgment that will settle the principal case (c. 1607).

1. *Comm.* 2 (1979), p. 140.

Moreover, the same procedural norm will govern interlocutory judgments to be pronounced by the collegiate tribunal.

b) From that moment on, the presiding judge will pronounce a decree summoning the judges to meet, on a given date, time, and place, in order to deliberate. This meeting must first and foremost be held at the tribunal office (c. 1468), and only when there is a special reason advising otherwise, according to c. 1609 § 1, will the presiding judge indicate another location for the deliberation. It can be any location, without there being any limitation on the case, unless it is a place outside the territory of the tribunal's jurisdiction (c. 1469 § 1), but it must always be the place established in advance in of the summons.

c) Once the judges have come together, overseen by the presiding judge, after an invocation of the divine Name, following the order of precedence that applies among them, always beginning with the *ponens* or *relator* (c. 1429), each will read the conclusions proposed as the dispositive part of the judgment (c. 1609 § 3). Taking into account the fact that every judgment must be based in law and in fact (c. 1611, 3°), those conclusions reached by each judge will be so because they are supported on the legal and factual arguments that have been prepared by them on the cause of litigation, such that each of the judges must submit in writing, pursuant to c. 1609 § 2, not only their conclusions, but also the legal as well as factual reasons supporting them. Each of the judges, therefore, has the duty, characteristic of this judicial office, to submit a type of personal draft of the judgment, that the presiding judge must keep secret, and they must be added to the acts of the case.

The canon does not make it clear how to reconcile this secrecy with the fact that they must be incorporated into the acts of the case, which may later be sent to another instance. Perhaps it would be appropriate for that additional notation to be made in the acts through a reference to an archive in which these drafts are kept under the control and care of the presiding judge, or also being directly incorporated into said acts but in a document closed and sealed by the presiding judge. Article 89 § 3 of the *NSRR* (1994), after its § 2 provides that each auditor shall draft his conclusions or votes in the Latin language and sign them in his own hand, and provides that those written votes of the auditors, once the judgment is drafted and presented by the *ponens*, must be submitted in a sealed envelope to the archives of the Dean, and then burned ten years later. This norm seems more correct than what the *CIC* itself provides in this canon, inasmuch as, in principle, they are of no public significance, belong to the confidentiality of the preparation of the judgment. Moreover, by their very nature, they may be amended by their authors during the discussion of the judgment.

d) After the reading of the various conclusions, which are really draft judgments, produced by each of the judges, there will be a discussion of said conclusions. Above all, said discussion must be directed towards

determining what should be established in the dispositive part of the judgment (c. 1609 § 3). At this time, the discussion will follow the aforementioned order of precedence, beginning with the issuance of the opinion of the *ponens* or *relator*. This is also the time when there will be a rapprochement toward a decision on the merits of the case, with differences being reduced to the sole solution that must be expressed in the judgment. That is why c. 1609 § 4 establishes that any judge may amend his or her own conclusions to reach that unified decision, governing the specific case, which is the judgment of the tribunal, not the judgment of each of the judges, nor the judgment of the *ponens*, given that he or she is only one of the judges, although it is his or her duty to draft (c. 1610 § 2) the final text by which the tribunal will state its judicial will in the form of the judgment.

Article 90 of the *NSRR* (1994) provides that the discussion of the cause is secret and only the judges will attend. The canon says nothing of the secrecy of this discussion, nor is it expressly provided that only the judges will attend and not, however, the parties' legal representatives, the promoter of justice or the defender of the bond if they are parties to the matter, or even the notary to prepare a record or attest to what is discussed therein. Nonetheless, canonical procedural doctrine and the practice of the tribunals agree that this discussion is protected by secrecy, in an environment of solitude for the members of the tribunal, who, although there is more than one of them, submit the judgment as a juridical product developed jointly by all of them.

In spite, however, of this apparent unanimity of the judges when pronouncing the judgment, c. 1609 § 4 authorizes the judge whose vote is different from that of the majority, in which he or she does not wish to be included, to demand (*exigere potest*, according to the legal text) that his or her conclusions be transferred to the court of appeals. We do not happen to see this same provision in the aforementioned new Norms of the TRR, for occasions when there is an appeal to another Rotal *terna*, perhaps as a result of this canon's having been subjected to criticism by some scholars of canonical procedural law, but for now we only mentionthis matter in order to go into it further later on. The *NSRR* (1994) in art. 91, however, provides a more specific method for reducing differences to a common opinion, be it through total or partial amendments to the conclusion of the judge or auditor, or by adding the vote or votes of the other judges. The author of the vote should indicate the amendment made. It seems that this latter norm would also deserve to be taken into account when amendments are made to the conclusions, in search of unity in the judgment of the other tribunals of the instance that are not the TRR.

e) In c. 1609 § 5 we can foresee the situation in which, at the discussion meeting, the judges do not manage to produce the judgment, in the dispositive part, either because they could not reach an agreement, or they refused to (*aut nolint aut nequeant*), in which case the decision may

be left for a subsequent meeting, which must be held within the following week. A week is understood to mean a space of seven days (c. 202 § 1), which will deem a day *a quo* the one following that on which the deliberation meeting was recessed (c. 203 § 1).

We believe that the judgment must be pronounced without delay at this second meeting, without the possibility of a new recess and summons for another day. This is because, following the majority vote principle, when the presiding judge sees that the discussion is continuing without the judges' positions being reconciled, he must without delay order that the vote be taken. In this way a time delay is avoided in the pronouncement of the judgment, which is never desirable in the proper administration of justice. This urgent need to resolve the disputed case as soon as possible can be explained with even more reason when it is noted that canon law does not provide any time period for the first summons, which could have been established from the day on which the only thing pending in the proceedings is for the judgment to be pronounced. This leaving *sine die* the time for the presiding judge to summon the first, and at times only, meeting of the college unquestionably keeps the judges from being subjected to rigid terms in deciding the case. Thus he can provide them with freedom of movement for reflection, which avoids overwhelming the decision-makers, but does not fail to bring to the rhythm with which the case must proceed a disturbing delaying element that may prejudice the parties themselves.

f) Lastly, the delay in deciding the case can be even longer when the tribunal, during the discussion, decides that the instruction of the case must be completed. For this purpose, the provisions of c. 1600 must be complied with.

In deciding the broadening of the evidence, the tribunal must comply with the situations provided by c. 1600, which, in our opinion, because of their exceptional character, must be interpreted strictly (c. 18).

This strict interpretation we believe applies even to § 3 of c. 1600. We believe that, inasmuch as the only pending proceedings are the judgment, and given that the decree to broaden the evidence was pronounced at the point in the proceedings in which the judges meet alone, without the parties or even a notary, in order to decide the case and pronounce the judgment, completing this evidence devolves solely upon the judges, and that the supplemental instruction that takes place belongs to that procedural point in the discussion that devolves only upon them. Therefore, the tribunal should not proceed to a new publication of the evidence. Only in the appeal, if there is one, will the parties be able to request a publication thereof, for whatever purposes the parties find appropriate, for the sake of their interest in the proceedings. Article 94 of the *NSRR* (1994) only establishes that, if the second meeting of the judges cannot reach the majority necessary for the vote, the *ponens* must inform the dean in order that he adopt the measure of increasing the number of judges.

3. We have observed how c. 1609 § 2 orders that the conclusions that must be submitted by each judge for the discussion of the cause and the fact that they are included in the acts of the proceedings *secreto servandae*. This provision includes a type of implicit desire that none of the judges attend the meeting to which they are summoned without having first studied the case in question in depth. It is noted, however, that the canonical norm shows a certain interest, that we could describe as being of a historical nature, in retaining those votes for the future.

The *NSRR* (1994) have not had that same interest, because, as we have already seen, they order that the votes be destroyed once ten years have elapsed from the time they were cast, in agreement with *PrM* 203 § 1. From the point of view of the archiving of those conclusions, for the moment we do not find any other interest, especially when the only decision that must be taken into account is that contained in the judgment, and those conclusions or votes are only personal drafts of the judges, offered solutions, which, outside of the scope of the meeting in which they are submitted, lack any juridical relevancy whatsoever. This leads to the fear that, in practice, on some occasions, the juridical reality may not coincide with what is formally established by law, because it is more comfortable to first hear the position of the *ponens* and then agree or disagree with it.

This fear, does not arise in the situation of c. 1609 § 3, when one of the judges does not join the rest, and on the contrary, demands that his conclusions be sent to the higher court in the event of an appeal. In this case, those conclusions may have relevant significance for the higher court, which will not only hear and judge the appealed judgment, but will also take into account the dissenting voice (or voices) when discussing the judgment.

This norm, however, has been the object of criticism by one sector of doctrinal opinion,[2] which, in short, maintains: *a*) that the legitimacy of recognizing a right to violate confidentiality is questionable; *b*) that it contradicts the fact that the decision is of the tribunal because it is a tribunal and not of each of the judges, and the dissenting judge is obligated to defer to the decision of the majority; *c*) that it is reprehensible for the judges, when issuing the judgment, to make it clearly understood that they do not agree with the decision of the absolute majority, with the danger of violating the provisions related to the secrecy by which the other judges have appraised and voted on the case.

Therefore, the new norm is still viewed suspiciously as a possible source of division and open confrontation between the judges, which may arise when their various positions are made public, those of the majority of voters and those of the minority. Nonetheless, in civil procedural systems,

2. Cf. J.J. GARCÍA FAÍLDE, *Nuevo Derecho Procesal Canónico* (Salamanca 1984), pp. 177–178.

there is an increasing tendency toward publication of the votes of judges who diverge from the tribunal's judgment. The subject's desire to only take responsibility for their own acts and the defense of their own prestige and the personal judgment with a clear conscience on the issues judged is not in accord with the anonymity that comes from the solidarity of the members of the tribunal with respect to the judgment of the collegiate court. Therefore, at present, it is proposed that the opposing individual vote should be made known with the result arrived at by the collegiate judicial body.

Uniting protection of liberty and of the judge's own personal responsibility with his or her participation in a collegiate tribunal, which operates with judicial power (which is unique and comes from the hierarchical power of the Church), does not cease to be an issue to be considered with an eye to the future. The fact that we know in advance that the decision is that of the majority is nonetheless no reason to force it to always be presented to the outside as the result of unanimity between the judges. Moreover, the existence of a dissenting judge does not mean that he or she does not defer to the decision of the majority, but rather it only manifests his or her disagreement before a higher tribunal until the judgment is final, but not after it has been made final and acquires the effect of adjudged matter. It is also worth noting that there is no binding confidentiality when the law itself establishes the situation in which the secrecy can cease to exist, without affecting the judges that voted with the majority, inasmuch as their judgment has been made public in the judgment and in the statement of its reasons.

In sum, we believe that this sending of the conclusions of the dissenting judge or judges still means that the law has taken a position that demands, at least in its execution, very careful and judicious treatment to avoid any publicity. Said sending, and the content of the dissenting vote, is kept in the secrecy with which every court of justice must act when pronouncing the judgment, be it a lower or a higher court.

In our opinion, it would not be wise for the court of appeals to reverse or uphold the appealed judgment by making reference to the dissenting conclusions. The higher court must know them and they will enlighten the wisdom of the appeal, but this tribunal shall judge in view of the entire process, without the judgment making any reference to the vote of the dissenting judge who asked that his or her conclusions be sent up. In the proof stage, or the stage in which information is given to the parties, which may result in an appeal, the higher tribunal may not make known to said parties, be they public or private, those conclusions of the dissenting judge, nor does it even have any reason to make known its existence. In the balance between the secrecy maintained by the higher tribunal with respect to what was kept secret in the lower court, and the information necessary for the higher court regarding the various positions of the judges with respect to the appealed judgment, we believe the

solution can perhaps be found to a matter that, although it could be deemed just, would still be at times annoying. For this purpose, it is worth starting from the idea that the vote of the dissenting judge does not create any right for the parties. Therefore, in the various instances, it must be kept in confidentiality, which from the beginning has characterized the presentation before the tribunal of the conclusions that were individually offered by its judges.

1610 **§ 1. Si iudex sit unicus, ipse sententiam exarabit.**

§ 2. In tribunali collegiali, ponentis seu relatoris est exarare sententiam, desumendo motiva ex iis quae singuli iudices in discussione attulerunt, nisi a maiore numero iudicium praefinita fuerint motiva praeferenda; sententia dein singulorum iudicium subicienda est approbationi.

§ 3. Sententia edenda est non ultra mensem a die quo causa definita est, nisi, in tribunali collegiali, iudices gravi ex ratione longius tempus praestituerint.

§ 1. If there is a sole judge, he will draw up the judgement.

§ 2. In a collegiate tribunal, the *ponens* or *relator* is to draw up the judgement, using as reasons those tendered by the individual judges in their discussion, unless the reasons to be preferred have been defined by a majority of the judges. The judgement must then be submitted to the individual judges for their approval.

§ 3. The judgement is to be issued not later than one month from the day on which the case was decided, unless in a collegiate tribunal the judges have for grave reasons stipulated a longer time.

SOURCES: § 1: c. 1872
§ 2: c. 1873 § 2; *NSRR* 143 §§ 2 et 3; *PrM* 200 §§ 2, 4 et 5; *SNAS* 121, 122 §§ 2 et 3
§ 3: *NSRR* 143 § 1; *PrM* 200 § 1

CROSS REFERENCES: cc. 135 § 3, 202 § 1, 203, 1424, 1426 § 1, 1428 §§ 1 et 3, 1429, 1603–1606, 1608–1609, 1611–1612, 1614, 1620,2°, 1622,2°–4°, 1629,4°, 1668

COMMENTARY

Carmelo de Diego-Lora

In the three paragraphs of the canon, there are two subjects that are regulated. First, how the judgments are drafted (§§ 1–2), and second, after the case is decided, the term for the judges to make the judgment known (§ 3).

1. Let us begin with the first of the norms, that of § 1, which, instead of enlightening us on the way to draft judgments, only indicates *who it is that must draft them.* The way to draft them is more inferred from the provisions of cc. 1611 and 1612. These canons (see commentaries)

enumerate, respectively, the requirements of the judgment, specifically, the internal requirements, that still have a formal external wording, because they refer to the content on which the statement of the will of the judge must be pronounced. They enumerate external formal requirements as well, that duly place the judgment that is pronounced in the procedural context, which requirements also form a relationship with the internal central core of the process, because, without them, the judgment would be null (cf. c. 1622, 2°–4°).

Moreover, c. 1608 should be taken into account, if it is a judgment for the petitioner (§§ 1–3), as well as a sentence of dismissal (§ 4). In fact, without achieving moral certainty regarding the merits of the case discussed, or, on the contrary, without having experienced in his conscience the lack of moral certainty regarding the merits of the case in question, the judge cannot be thought to go from the study and contemplation (or discussion, if it is a collegiate tribunal), to the drafting of the judgment. What this means is that c. 1608 with respect to c. 1610 is not only a precedent in the norms of the code, but also a necessary logical precedent for the judge to be able to draft the judgment.

Therefore, starting from these precedents, it could be said that when § 1 of the canon under discussion provides that the judge, if he is the sole judge, must draw up the judgment, it seems to be stating the obvious. However, the provision does bear explanation. This explanation is found in c. 1424, according to which the sole judge may use two assessors assisting him with their advice. The consultative role to which the assessors must limit themselves (see commentary on c. 1424) is evidenced thus with more emphasis in this c. 1610 § 1 when it provides that the drafting of the judgment pronounced by the sole judge is a function that devolves exclusively upon him. Unlawful conduct by these assessors in drafting the judgment would nullify it because they would incur the nullity established in c. 1620, 2°, although this nullity is not mentioned in c. 1610 § 1.

This would also occur by analogy if the sole judge appoints an auditor to carry out the instruction and receive evidence for these purposes (see commentary on c. 1428). The functions and limits of the auditor are perfectly described in the *CIC*, also in accordance with the provisions regarding the limits on the delegation of judicial power that the judges and tribunals have pursuant to c. 135 § 3.

Canon 1610 § 1, without regulating the way the judge is to draft the judgment if he is the sole judge, when providing that he and only he must be the one to draw it up, is obviously stressing the person who must be the only author of the judgment and the only one responsible therefore, even if he has received advice from the assessors, and even if he has received collaboration from an auditor for the instruction of the case.

2. Another issue is the one that arises when it is time to draw up the judgment *when the tribunal is collegiate*. Without changing what has been said regarding the auditors when the collegiate court appoints them,

it must be stated that the judgment of a collegiate tribunal is the judgment of all the members of the tribunal (see commentary on c. 1609). One of them, however, may demand that the higher court hear his or her dissenting conclusions (cf. c. 1609 § 4). The collegiate tribunal, although it pronounced the judgment by majority vote, decides the cause of litigation collegially (c. 1426 § 1), that is, it is always the judgment of the collegiate tribunal.

However, the act of drafting the judgment requires a specific author, using theirmental and physical faculties in the service of the court in order to finally execute its will, expressing in writing the unanimous or majority decision, once the dispositive part of the judgment is established (c. 1609 § 3). This function should be performed from within the court itself, because at this point in the procedure, other subjects who are not members of the court cannot act. Hence the presiding judge, in each specific case, must appoint a *ponens* or *relator* who, when the court meets to discuss the judgment, not only will carry out the task of reporting on the progress of the case throughout the process and making known his or her own conclusions (in this aspect, the same as the other judges, although the first of them to report), but also *will draw it up in writing* (c. 1429). Canon 1610 § 2 stresses this provision when it establishes that it devolves upon the *ponens* or the *relator* to draft the judgment.

Inasmuch as the judgment is the work of the college of judges who make up the court, once it is drafted by the *ponens* or the *relator*, it must be submitted for everyone's approval, because they all must sign it (c. 1612 § 4), as the authors and those responsible therefor, and if this norm is not complied with, the judgment is null (c. 1622, 3°).

Once the draft is written, the next step will be to *approve the judgment*. This draft is in fact the draft judgment prepared and submitted by the *ponens*, and it may have, because it is a draft, any appropriate changes suggested by the other judges of the court, These changes will be made by the *ponens*, until he or she gets approval from everyone, including any judge casting a secret negative vote, because he or she must also sign and may disagree with any formal expressions, grammar, legal concepts, etc., which he or she believes must be amended. However, this intervention and subsequent signing of the judgment should not be understood as a waiver of his or her contrary opinions, in the event that he or she has demanded that they be sent to the higher court of appeals. In fact, even if there is a disagreement on the fundamental issues, said judge can and should help the others in the purely formal and conceptual issues, inasmuch as the judgment must also be signed by him or her, who would ideally to take responsibility for what should be a job well done.

It is logical that if the judge appointed to be the *ponens* or *relator* in the specific process is the judge who later disagrees with the majority, the presiding judge will then handle the appointment of another *ponens* to draft the judgment. For this purpose he or she will take suitable, prudent

measures, based on any reasonable and reliable reason temporarily excusing this judge from this duty, to be replaced by another whose opinion is in agreement with the majority. No one can be morally forced to fulfill a juridical duty, such as reasoning a judgment, when the primary requirement for the author is for it to be consistent with his or her thinking when stating it, and he or she cannot if not in agreement with the decision and reasoning provided by the majority. This requirement would not be ethical, and therefore this *ponens* should be excused from writing the draft.

In fact, c. 1610 § 2 provides that the *ponens* or *relator* shall take the reasons for the judgment from among those that were offered by the judges in their written proposals submitted pursuant to c. 1609 § 2. These reasons were the basis for the discussion, which could also include opposing opinions and bases, and which, if they were rejected in the discussion by majority vote, would understandably also be rejected by the *ponens* when drafting the judgment. They may only be taken into account, in extreme cases, as possible hypotheses the invalidity of which could be concluded in the arguments of the judgment.

But the canon, in this § 2, even offers a new option for the drafting of the reasoning for the judgment, it is the situation in which those judges in the majority deciding the vote on the judgment, in the discussion, expressly decide to determine the reasons that should be preferably set forth. The job of the drafter then becomes much easier. It is enough for him or her to abide by the agreement of the other judges. This agreement, in our opinion, must be unanimous in the majority votes, because it is not possible to reconcile the demand for a majority needed to pronounce the judgment with the fact that, therein, there can be one or more other majorities of a lesser number in some way determining the wording of said judgment.

Once the judgment is drafted by the *ponens*, obviously he or she must, through the presiding judge, pass on this draft to the other judges, who will make any appropriate changes, deletions, or additions of new arguments, etc., which the *ponens* must later incorporate into the draft.

3. Just as all must sign the judgment, so the same occurs with approval of the final text. This internal procedure, characteristic of the functioning of a collegiate tribunal, designed for obtaining final approval of the text from everyone, may, on many occasions, take a long time. This explains why, once the case is decided, the judgment must be made known within an ample period of time, one month from the day in which the case was decided. This is the provision of § 3 of the canon.

It is necessary to determine, then, on which *day the case was decided*. In a collegiate tribunal, it should be understood as the day on which they finish discussing the case, because at that moment, the dispositive part of the judgment must be deemed as established. If there was only the one meeting mentioned in c. 1609 § 3, the month to be computed will have

its day *a quo* on that day on which the discussion took place.If, however, it was adjourned for another meeting to be called, the day *a quo* will be the day on which the second meeting took place, pursuant to the provisions of c. 1609 § 4. Note that this way of starting the calculation according to c. 1610 § 3 (*non ultra mensem a die quo causa definita est*) is not the same as c. 203 § 1, in which the calculation begins on the following day. Moreover, when this provision under discussion states "before one month," this month, according to c. 202 § 1, will be thirty days. Consequently, the day *ad quem* (c. 203 § 2) will be day thirty of the days elapsed from the beginning. Also from that first day, with the permission of the judge or presiding judge of the court, the dispositive part of the judgment may be made known (c. 1614).

Lastly, c. 1610 § 3 foresees the possibility that, for a grave reason, the judges of the tribunal (thus not only the presiding judge), may establish a longer term. In our opinion, given the exceptional nature of this measure, that term must be established by a reasoned decree, setting forth the *grave reason* for the delay. The appropriate time for this pronouncement will be the same day the case is decided, which is the same day the court decides what the dispositive part of the judgment is. If this extension of the term for making the judgment known is determined later, the decree ordering the delay should explain the reason leading to this decision within a term no longer than the month provided by the canon. This decree, because of its nature (cf. c. 1629, 4°), is not appealable.

4. What has just been set forth in no. 3 refers to the collegiate tribunal. When there is a sole judge, however, the problem arises in determining the day *a quo*, when the case is decided, for the calculation of thirty days to begin for the judgment to be made known. In our opinion, the terms *sententia edenda est* of c. 1610 § 3 should not be confused with the terms *sententia quam primum publicetur* of c. 1614. When c. 1614 discusses publication, it refers to the notice that the judgment has been fully drafted, at which time it begins to take effect.If, however, the parties to the litigation are informed only of the dispositive part of the judgment, this only an informative act and as such has no legal effect, other than merely informative. If this is done, with the authorization of the judge, it could be said that the case has then been made known because it has been decided, but we believe that this point in time cannot be left up to the judge's discretion. Therefore, we believe that the term of thirty days for making the sole judge's judgment known should be calculated from the time in which the judicial proceedings were pending judgment, pursuant to the provisions of cc. 1603–1606.

The above will only apply for ordinary contentious trial in the event that there is a sole judge hearing and deciding the case. On this point, regarding the consistency of the term for pronouncing the judgment, and the assurance that it will be met, c. 1668, regarding the oral contentious process, should be highlighted. It clearly indicates, in §§ 1 and 2, the two

possibilities foreseen for making known the dispositive part of the judgment, while § 3 exactly foresees a later term for notifying (*publication*) the parties of the fully-drafted judgment. The innovation of this canon in the new process could serve as a good point of reference for presenting their opinions, and not their times and terms, in the new regulation of the ordinary contentious trial.

1611 Sentencia debet:

1° definire controversiam coram tribunali agitatam, data singulis dubiis congrua responsione;

2° determinare quae sint partium obligationes ex iudicio ortae et quomodo implendae sint;

3° exponere rationes seu motiva, tam in iure quam in facto, quibus dispositiva sententiae pars innititur;

4° statuere de litis expensis.

The judgement must:

1° define the controversy raised before the tribunal, giving appropriate answers to the individual questions;

2° determine the obligations of the parties arising from the trial and the manner in which these are to be fulfilled;

3° set out the reasons or motives, both in law and in fact, upon which the dispositive part of the judgement is based;

4° apportion the expenses of the suit.

SOURCES: 1°: c. 1873 § 1,1°; NSSR 146; *PrM* 201 § 1; *SNAS* 122 § 1
2°: c. 1873 § 1,2°; *NSRR* 146 § 2
3°: cc. 1605, 1873 § 1,3°; *NSRR* 143 § 3; *PrM* 200 § 3; *SNAS* 122 §§ 2 et 3
4°: c. 1873 § 1,4°; *NSRR* 144 § 3, 147–149; *PrM* 200 § 3; PAULUS PP. VI, Alloc., 11 ian. 1965 (*AAS* 57 [1965] 236)

CROSS REFERENCES: cc. 1452, 1493, 1501–1502, 1504,1°, 1513–1514, 1571, 1580, 1610, 1612 §§ 2 et 3, 1620,8°; 1622,2°, 1649, 1651, 1653–1655, 1661 § 1, 1677 §§ 2 et 3, 1684 § 1, 1685

COMMENTARY

Carmelo de Diego-Lora

1. *Sententia debet:* In using this verbal expression, the canon is referring to the internal content that the judgment *must* include in its wording, which is, moreover, what the drafters must adopt (c. 1610) with respect to the pronouncement of the judgment as well as its basis. These internal elements of the judgment, in turn, do not fail to have implicitly a formal requirement as evidenced in c. 1612, especially its §§ 2 and 3. Therefore c. 1620, 8° succeeds in declaring absolute nullity of the judgment in the

event that it does not at least partially define the terms of the controversy, the totality of which is required by c. 1611, 1° to be defined. In turn, c. 1622, 2° also declares nullity, albeit remediable, when the judgment violates no. 3° of c. 1611, that is, if it does not contain the reasons or motives for the decision.

Here, the desire is to make clear that c. 1611, in the mandatory provisions contained in its text, sets forth the requirements entailed in the drafting of the judgment, in the dispositive part (nos. 1°, 2°, 4°), as well as in the part related to the basis, which includes the facts and the law applicable to those facts if proven (no. 3°), although not all those requirements have the same level of importance.

That two-faceted nature, proper and necessary in the judgment, explains the attempts by which juridical doctrine has tried to characterize it. The most characteristic part of the judgment has been said to be the rationale with which it must be argued, from which its dispositive part results as a conclusion. That rationality would be a fundamental syllogism in which the law would be its major premise, the facts presented to the process its minor premise, and the conclusion would be its result, which is what is designated as the dispositive part, or pronouncement, of the judgment. It is sufficient to show the complexities entailed in the study and processing of judicial causes, as well as everything concerning moral certainty and the method for achieving it (see commentary on c. 1608), in order to conclude by stating that the logical operations required for reaching the judgment are a bit more complicated than the aforementioned so-called *judicial syllogism*. There will then be a discussion of a connected series of syllogisms, and even a clash or collision between reasoning methods, in which some have to yield to others when they have greater force in their certainty, or greater authority in the juridical bases on which they are supported.

In contrast with those supporting this doctrine, there are authors who stress the judgment as an act-of-will. In this way, they stress its characteristics as an act of authority, a resolution of a dispute, the imposition of obedience and demand for compliance with the obligations established by the judgment. There can be judgments, it can be maintained, without reasoning supporting them, but not without a dispositive part, which is where the resolution of the dispute and juridical effect are found. Canon 1605 § 1 of the *CIC*/1917 still maintained the norm, not included in the current Code, which affirmed the validity of the judgments of the Signatura even if they did not express the factual or legal reasons. If it has been said that judgments are acts of the statement of the will of the judges, it is logical to maintain, consequently, given that judges apply law to a specific case, that judgments are statements of the specific will of the law. This type of position has not been without its objections, because if using the terms *mens legis* is still a metaphorical use of the words, describing a judgment as *voluntas legis* is even less precise. In any event, it will be the

will of the judge issuing the judgment, even if he pronounces it as a specific body of the Church, for the application of law to the specific case.

In sum, using the classic distinction between *auctoritas* and *potestas*, of Roman origin, it could be said that those who rely more strongly on the relevance of the logical-juridical aspect of the judgment are striving to stress its *auctoritas*, based on the moral force proceeding from its prestige by virtue of the excellence of the reasoning in support of justice served by the judgment. At the same time, those perceiving the judgment as an act of will take into account more the service rendered therewith for the effective exercise of *potestas iudicialis*. Perhaps it is appropriate to agree that the judgment needs *potestas*, in order to have the opportunity to be pronounced and also to be able to achieve the effectiveness necessary for justice to be established in society, as well as that *auctoritas* that comes from a well-founded argument, manifesting the rationality of canonical law and guaranteeing that justice will be administered in ecclesiastical society not through the judge's discretion but as a fruit of his intellectual exercise. This is evidenced in the logical arguments based on knowledge of the canonical system, its jurisprudence and doctrine from the authors, as well as on a careful analysis of the alleged facts and the result offered to the judge by the evidence brought to the process and the evaluation made thereof by the one trying the case.

2. Both aspects just indicated are present in this canon under discussion. Let us begin with the sections *referring to the act of will*, by which the object of the litigation is expressed, which object must be resolved by the judgment, which the parties have submitted to the knowledge and judgment of the judge or tribunal:

a) In the first place, according to the letter of no. 1°, the judgment must *definire controversiam coram tribunali agitatam*, this definition takes place by giving the proper answer to each of the questions. These questions are, usually, the ones formulated by the judge or tribunal in the decree mentioned in c. 1513, at least for more difficult cases, and this is what canonical doctrine has named *solemn joinder of issue*. This does not mean that in the easier or less complex cases the process does not have those questions that the judge must answer, but that due to the simplicity of the problems being debated in that cause of litigation, there is no need for an express formulation of the question (or questions), because they are easily evidenced in the complaint and in the answer from the respondent once notice is served. This is what is usually called the *simple joinder of issue*. However, c. 1661 provides that for the oral contentious trial the judge will determine the questions. Canon 1677 §§ 2 and 3 establishes that in nullity of marriage proceedings they will be formulated by decree, including not only whether nullity should be declared, but also specifying the ground (or grounds), (each of them, if there is more than one, constitutes a specific cause of nullity, a specific question raised), by which the validity of the marriage is challenged.

The question (or questions) raised, in one way or another, after notice is served on the respondent and his or her possible answers, constitute, fashioned according to the case, the object (or objects) of the process, on which the judge or tribunal must make a pronouncement in the judgment. The answers in the judgment must be adapted to those questions, without the judgment going too far and granting more than what was asked, or making a pronouncement on issues not raised by the petitioner or the respondent, just as the judge cannot limit himself to granting less than what was asked for or failing to respond to any question raised.

The phenomena just described are phenomena that procedural doctrine describes as *incongruity of the judgment.* This incongruity is called *positive* when it violates the principle of *ne eat iudex ultra petita partium*, and *negative* when it violates the principle of *ne eat iudex intra petita partium*; and *mixed* if what is violated is the principle *ne eat iudex extra petita partium.*

Procedural doctrine has discussed what happens to judgments described as incongruous, and there are cases in jurisprudence in which, because of said defect, the judgment was declared null. The *CIC*, as already indicated, in c. 1620, 8°, provides absolute nullity of a fully incongruous judgment. Although this terminology is not used, it nonetheless declares this nullity of the judgment when *controversia ne ex parte quidem definita est.*

The necessary congruity of the judgment is required by the pleading nature of the process, and specifically the canonical process as well-evidenced in cc. 1501 and 1502. This principle of the initial petition is then shown throughout the process when c. 1504, 1° and 2° requires for the petition, among other requirements, that it express the *quid petatur* and the factual and legal basis on which the petition is supported. Canon 1513 also specifies that, after notice is served on the respondent, the judge must formulate the terms of the dispute, which also include the requests inferred from the statements and defenses alleged by the respondent, as well as those of the possible counterclaim. Moreover, once the questions are formulated, and the joinder of the issue situation arises, neither the judge nor the parties will be allowed, pursuant to c. 1514, to validly amend the terms of the dispute, except in compliance with the special requirements that are foreseen in the canon itself for said amendment. For this reason, in the *ius vetus* itself, a general principle is accepted, that was retained in the current Code, which consists of the statement *sententia debet esse conformis libello.*

The internal consistency of the process goes through the various stages, from the libellus of the lawsuit to the judgment. This is why it must also be required for the admission and presentation of evidence even if we lack a general canon in this regard, even if it indirectly appears sporadically in some concrete canon, such as the one regulating the characteristics that must be present in the questions asked of the witnesses, among

which are included, according to c. 1564, the requirement that they be *pertinentes ad causam quae agitur.* The matter of the irrelevance of the evidence, due to a lack of consistency with the matter in dispute, is significant because it must be the main criterion, together with its legitimacy, which the judge must use in order to reject proposed evidence, as authorized by c. 1528 § 2, (although this canon makes no provisions regarding the reasons for which the judge must reject the evidence presented).

Lastly, it should be taken into account that when it is a judgment of dismissal, because of a negative answer to the questions posed, if the formulation of this negative answer is generic, inclusive of all those questions, the judgment will not suffer from the defect of inconsistency. The judgment will be consistent if it affirmatively answers one more or more of the questions and generically absolves the rest, because in this case, it is simply considered that the answer is negative with regard to the remaining questions.

b) Number 2° of the canon does not contain a provision that applies to every judgment, although it follows the words *sententia debet*, with which the canon begins. The judgment must meet the content requirements of no. 2° when: *a*) the judgment is totally or partially for the petitioner; or *b*) it is a judgment of *conviction* (see introduction to this tit. VII, *De iudicis pronuntiationibus*, and the commentary on c. 1607).This is because only in these situations can there be obligations that must be complied with.

Declarative and constitutive judgments do not directly entail obligations that must be executed. Even if judgments of nullity of marriage are often accompanied by an executory decree (c. 1651), this decree is not necessary for the nullity itself, inasmuch as its effectiveness takes place for the spouses *ipso iure* through notice of the second resolution pursuant to nullity (c. 1684 § 1).

For the purposes of being incorporated into the registries of marriages and baptisms, however, even though c. 1685 mentions that the judgment *facta est executiva*, instead of executing its content, it would be more appropriate to speak of the need for recording in the registry, and not in the interest or the rights of the spouses, already satisfied by means of c. 1684 § 1, but for the sake of ecclesiastical public order and the good of the souls. Canon 1685 in fact, is not intended for either of the spouses affected by a judgment of nullity, but for the competent organs of the administrative organization of the Church in charge of, and responsible for, having the records of the ecclesiastical public registries reflect the juridical realities that must be duly recorded. The judgment called "executive" according to c. 1685 does not correspond to the judgment the execution of which is regulated by cc. 1653–1655.

Therefore, the provision of no. 2° of the canon under discussion would only have to be taken into account when the judgment itself, by defining the controversy (no. 1°) and answering the questions raised,

imposes obligations on either of the parties to give, do, or refrain from doing something, the obligation of which usually falls to the losing party. The provision reads *obligationes ex iudicio ortae*, but no obligations are derived from the trial other than those pronounced by judgment in its dispositive part. However, the provision ensures not only that those obligations be determined in that judgment, but also *quomodo implendae sint*. These methods of compliance, if one is not obliged to voluntarily comply with the judgment, must be observed and enforced, after the executory decree, by the bishop of the diocese in which the judgment of the first grade was pronounced, in the same way that all judgments must be subject to the provisions of cc. 1654 and 1655.

If pronouncements other than nullity could be added to the judgment declaring nullity of marriage, except the possible veto allowed by c. 1684 § 1, as, for example, that mandating which of the spouses must live with the children, or other measures of a patrimonial nature, resulting from the nullity declared, the judgment, in these hypothetical situations, would add to the mere judicial declaration of nullity provisions that could create obligations, inasmuch as in these cases certain conduct would be imposed. However, this type of pronouncement, to our understanding, at present exceeds the possible object of the litigation in a nullity of marriage case, the specificity of which resides in that adherence to the characteristic object of the litigation described in c. 1677 §§ 2 and 3. Nonetheless, the procedural activity itself could demonstrate rash conduct that could make the losing party in the judgment deserve an order to pay restitution for damages, that the judge could impose in his judgment. Garcia Failde[1] echoes this idea in suggesting that they would be obligations resulting from the trial, and in this case, a pronouncement would be added to a merely declarative or constitutive judgment, the regulation of which regarding restitution for damages would have to be established in advance by a norm set by the bishop governing the tribunal (c. 1649 § 1, 4°). We believe that an order for restitution for rash conduct, by virtue of the principle of a petition for justice, cannot be imposed by the judge or tribunal unless preceded by an express petition in advance from the winning party in the judgment. Consequently, we believe also that an ex officio statement from the judge is not in accordance with the law, which, if there is no express petition, would only count for sanctioning the rash litigant with other measures, be they disciplinary procedures, such as an order for costs on the losing party (c. 1649 § 1, 2°), or criminal proceedings if that rashness could be defined and tried in another proceeding as a previously defined criminal act.

What could be added to pronouncements of judgments in the nullity of marriage proceedings is an admonition regarding the moral and even civil obligations that the spouses must undertake because perhaps they

1. Cf. J.J. GARCÍA FAÍLDE, *Nuevo Derecho Procesal Canónico* (Salamanca 1984), pp. 179–180.

are believed to be subject to a duty to support and educate, either the other party or the progeny. But this admonition, because it is such, does not entail any execution, because it cannot be confused with a juridically demandable obligation liable to be enforced through an order. This admonition, however, is made without the need for any act of execution, because it is made in the very act of serving notice of the judgment on the party being admonished, that is, at the stage in the proceedings defined by c. 1615 with the words *publicatio seu intimatio sententiae*, and therefore, without any subsequent executory activity.

c) Lastly, in connection with the dispositive part of the judgment, no. 4° orders that the judgment must *determine the expenses of the suit.*

The concept of judicial expenses is broader than that of judicial costs. Costs are that which result from the judicial activity itself, and will usually be subject to the norms of official charges prevailing in each tribunal. Canon 1649 attributes to the bishop governing the tribunal the power to regulate these charges as well as other expenses or expenditures incurred in the process. Among these expenses, according to c. 1649, 2°, we should also include fees for proxies, attorneys, experts, and interpreters, as well as compensation that witnesses deserve to be paid (cc. 1571 and 1580).

What is presented in the new legislation as characteristic in its entirety of particular law, in cc. 1908–1913 of the *CIC*/1917 to a large extent took on a general nature. Many of these canons now repealed nonetheless can to a large extent facilitate the work of the moderator bishop, intended to pronounce the norms for his tribunal regarding the various concepts now contemplated in c. 1649. This occurs, for example, with the decision to generally continue to impose judicial costs on the losing party, with the decision to order joint payment of judicial costs when more than one party is ordered to pay in connection with a joint obligation, and, prorated in other cases. It occurs also with the sharing of judicial costs, in full or in part, among the litigants when it is an issue only partly resolved in favor of one party, or to resolve a very difficult case, or when there are litigants who are related by blood or marriage, and even finally referring said division of costs to the discretion of the judge for any just or grave reason. Articles 233–235 of *PrM* also contained norms that can be useful in this new particular legislation to which the *CIC* refers.

With respect to indemnification for damages, c. 1910 § 2 of the *CIC*/1917 established the rule that if the petitioner or the respondent had acted rashly, they should also be ordered to pay damages. Canon 1649, 4°, however, refers to the particular legislation in which norms are pronounced for indemnification for damages, which must be paid not only because the lawsuit was lost, but also because the litigant acted rashly. One might wonder if this order to pay damages is an unavoidable consequence of the rashness with which the losing party litigated, as the *CIC*/1917 made clear, or if that rashness would now only justify that the judgment establish the

order for judicial expenses. This would not mean that the judicial pronouncements include an order to indemnify in which it cannot be surely stated that it is included in c. 1611, 4°, unless it was expressly requested by the party favored by the judgment.

Article 97 § 2 of the *NSRR* (1994) only requires that the judgment determine, after the answer given to the proposed questions, who is obligated to pay the judicial costs and the legal representation fees, but we do not find any mention of indemnification for damages. Only in c. 1649 § 2 are the concepts of costs, fees, and indemnification for damages united in a section with somewhat homogeneous treatment, when it provides that those various concepts of the judgment order cannot be appealed, although it allows the party to present those appeals, separately, within fifteen days, before the same judge who pronounced the judgment, who may amend his assessment. However, the word "assessment" (*qui poterit taxationem emendare*, according to the provision), does not correspond with the determination of an amount to be established by the judge in order to indemnify the party for damages suffered. In any event, we believe that if rashness in litigation justifies that the damages resulting from said conduct be indemnified by the final judgment, to which said order is added, the party prejudiced by said rashness will have to claim damages for rashness in the same litigation in which the rashness occurs, if he wishes to benefit from the compensation owing, giving rise to an objective accumulation of actions within the same cause pursuant to c. 1493, as a secondary action that is part of the primary action. We believe, however, that the judge or tribunal can never proceed in this way ex officio. They are not even allowed the broad judicial discretion given to the judge in c. 1452.

3. We have saved for the last the material of c. 1611 which does not belong to the dispositive part of the judgment, that is, the provisions of no. 3°: *the presentation of the motives or reasons, both in law and in fact, on which that dispositive part is based.*

John Paul II[2] stated that the objectivity characteristic of justice and procedure, with respect to the *factum,* is manifested in adherence to the truth, while with regard to the *ius*, it is manifested in the judges' fidelity to the law.

Normally, in the process, there is a *quaestio iuris* and a *quaestio facti*. In the methodology for achieving moral certainty in the judgment (see commentary on c. 1608), the path for the judge to follow is, firstly, following the chronology of the investigation, knowledge of the law in connection with the judicial effects sought by the petitioner. Once the law claimed in justice is known (for the purpose of contemplating the *quaes-*

2. Cf. JOHN PAUL II, *Discourse delivered to the Sacred Tribunal of the Roman Rota*, February 26, 1984, in *AAS* 7 (1984), pp. 643–649.

tio iuris as a whole), he will proceed to analysis and juridical study of the peremptory exceptions presented in view of the juridical effects sought. Once the judge is convinced that the petitioner had the right in justice to ask for what he claimed, the judge shall go into an examination and assessment of the evidence, for the purpose of verifying what actually exists in the factual statements of the party seeking a favorable judgment, which would entail an in-depth investigation of the elements making up the *quaestio facti,* which are hidden when submitted to the judge and it is only through the evidence that his agreement or disagreement with the factual situations described by the petitioner will be revealed.

In that order and in that scheme of knowledge, references, and diverse logical judgments, the judge will come to know both the truth of what is proposed, and the juridical reason supporting the juridical petitions set forth. Knowing how to explain all of this, occasionally long and complicated exercise of the human mind, is the most noble work of the judge, inasmuch as his social prestige, and the security of justice that the parties hope to receive, depend to a large extent on that knowledge and that wisdom of the judge, according to the truth and the law, because this knowledge is fit to be expressed in such a way that it can be shared by other readers of the judgment and by its recipients, the litigating parties.

The requirement of c. 1611, 3° adds dignity to the judgment, not to mention the fact that its correctness makes it just, giving to each their rights. The civilizing advance of law goes handinhand with that explanation by the judges on the truth and justice that shine through their judgments. Today's necessary adherence to the rationality and justice of the judgments in their explanation was not always present in all periods of history. At times, there have been undue objections to the canonical system because it lost sight of that demand for a basis, in contrast with judgments from democratic juridical systems, in which one of the guarantees of those who resort to the courts comes from the idea that all administration of justice is a reasoned act, based on law and on the proof of specific factual situations disputed in the process.

However, Llobell has highlighted the fallacy of these positions in a work of historical research of considerable importance regarding the canonical judgment.[3] Apart from some negative manifestations, of a limited and at times exceptional nature, characteristic of the time at which they occur and the then generalized juridical culture, then in very old canonical collections, such as the *Excerpta* of St. Isidore of Seville, the *Panormia* of St. Ivo of Chartres, or the *Decretum* of Gratianus, "it is strictly required that the judge achieve sufficient moral certitude, even if that expression is not used, as a guarantee of sufficient agreement between the real truth and the formal or procedural truth, in this way providing the judgment

3. Cf. J. LLOBELL TUSET, *Historia de la motivación de la sentencia canónica* (Zaragoza 1985).

with a *justification* by making it and declaring it just (expression of the *favor veritatis*). Moreover, when these provisions are violated, sanctions are imposed on the judge (suspension…) as well on the judgment (nullity or anullibility)."[4]

We conclude this exegesis of c. 1611, 3°, using words from the same author: "We can say that since the origins of canonical law, the need to present the motives for jurisdictional resolutions has been made effective and implicitly formalized by virtue of the objective to achieve *salus uniuscuiusque animae*… Judgments always have a clear therapeutic, pedagogical, and preventive nuance for those directly affected thereby and for the entire ecclesial community. That objective cannot be achieved without the motivation. Naturally, when referring to the beginning of Church history, we understand rationale to mean that the parties and the interested community must adequately know why a decision is made by the authority applying juridical norms to a specific case, even if that decision and its justification are not marked by the formal nature acquired with juridical modernization."[5]

4. Ibid., p. 170
5. Ibid.

1612 **§ 1. Sententia, post divini Nominis invocationem, exprimat oportet ex ordine qui sit iudex aut tribunal; qui sit actor, pars conventa, procurator, nominibus et domiciliis rite designatis, promotor iustitiae, defensor vinculi, si partem in iudicio habuerint.**

§ 2. Referre postea debet breviter facti speciem cum partium conclusionibus et formula dubiorum.

§ 3. Hisce subsequatur pars dispositiva sententiae, praemissis rationibus quibus innititur.

§ 4. Claudatur cum indicatione diei et loci in quibus prolata est et cum subscriptione iudicis vel, si de tribunali collegiali agatur, omnium iudicum et notarii.

§ 1. The judgement, after the invocation of the divine Name, must state in order the judge or tribunal, and the plaintiff, respondent and procurator, with names and domiciles duly indicated. It is also to name the promoter of justice and the defender of the bond if they were engaged in the trial.

§ 2. It must then briefly set out an outline of the facts, with the conclusions of the parties and the formulation of the doubt.

§ 3. Then follows the dispositive part of the judgement, prefaced by the reasons which support it.

§ 4. It ends with the date and the place in which it was given, and with the signature of the judge or, in the case of a collegiate tribunal, of all the judges, and of the notary.

SOURCES: § 1: c. 1874 §§ 1 et 2; *NSRR* 144 § 1; *PrM* 202 §§ 1 et 2; PAULUS PP. VI, Alloc., 8 feb. 1973 (*AAS* 65 [1973] 102–103)
§ 2: c. 1874 § 3; *NSRR* 144 § 2; *PrM* 202 § 3
§ 3: c. 1874 § 4; *NSRR* 144 § 2; *PrM* 202 § 4; *SNAS* 122 §§ 2 et 3
§ 4: c. 1874 § 5; CodCom Resp. XIII, 4 iul. 1922 (*AAS* 14 [1922] 529); *NSRR* 144 § 4; *PrM* 202 § 5

CROSS REFERENCES: cc. 10, 1422, 1437, 1448, 1472, 1478–1480, 1482 §§ 1 et 3, 1488 § 1, 1504,4°, 1508 § 1, 1512,2°, 1513, 1517, 1611,1°–3° et 5°, 1616, 1619, 1622, 2°,5°

COMMENTARY

Carmelo de Diego-Lora

1. We have here a canon that is purely formal in nature. The requirements it describes must be present in the judgment. Some of them, such as those provided in §§ 2 and 3, are still, nonetheless, outward expressions of the central core of the judgment (c. 1611, 3°) or expressions of the decision itself (c. 1611, 1°).

With the canon divided into four sections, there is an order among them, beginning with § 1, what we could call the "heading" of the judgment. The invocation of the name of God is the first of the requirements it establishes. It is immediately followed by a list of the subjects who took part throughout the process and who are, namely, the author and the recipients, respectively, of the public, binding the formal statement of will contained in the judgment.

The author of the judgment is the judge, if he is the sole judge, or the judges constituting the collegiate tribunal. They must be identified by their given names and surnames, according to the customs of each country for personal identification. The judges of the judgment are the same judges of the litigation according to the old principle *semel iudex semper iudex*, zealously preserved by c. 1512, 2°, which establishes the so-called *perpetuatio iurisdictionis*, intended to avoid, throughout the process, any manipulation that may substitute a judge when it is feared that the decision of that person may be contrary to the interest of any of the parties. Any removal of a judge not based on a lawful and grave reason (cf. c. 1422 *in fine*) may arouse suspicion of partiality in the judgment. If either of the parties fears, in a case, that the judge or any of the judges of the tribunal is not independent, it should exercise its legal power to recuse him if he is believed to incur any of the causes for challenge set forth in c. 1448.

Once the judge or judges of the tribunal are listed, the judgment shall state the names of the petitioner or petitioners, the respondent (or respondents), as well as the name of their proxies, if the parties acted by representation through the respective certified mandate *ad lites*, and also that of the advocates if they acted as representatives of the parties (c. 1484 § 1). It is not necessary, however, to indicate in the judgment the names of the advocates when their characteristic role was limited to advising and acting as legal representatives of a party in the process. Just as the proxy commonly substitutes for the party and acts on behalf of and for this party, for which reason he cannot be substituted by another (c. 1482 § 1), the appointment of a legal representative, when it does not entail this representation, is not subject to these limits in the proceedings, and even more than one legal representative at a time can be appointed by a party (c. 1482 § 3).

Moreover, if any of the litigants acts through a legal representative, although nothing is said in the canon in this regard, we believe that this legal representative (cf. cc. 1478, 1480, and 1508 § 3) must specifically be named, and identified as such, in this first part of the document that will be the judgment.

According to this § 1, it must include not only the names but also the domiciles. This question of indicating the domicile, or at least the residence, is noted from the first moment that the process begins, inasmuch as it is a requirement for the petition to be admitted (cf. c. 1504, 4°).

If the promoter of justice or the defender of the bond were engaged in the trial, they must also be named in the judgment with the capacity as a public party with which they acted and with the respective personal identification. It does not seem, however, necessary to refer to the domicile, because both are offices of the curia of justice, and it will be recorded in its archives.

Thus, the judgment first sets forth clearly and without confusion the identity of the subjects between whom a procedural juridical relationship has been created, be they situated therein in a position of inequality, such as that of the judges with respect to the parties, or in a position of equality, such as the parties to each other, be they private or public parties.

2. Secondly, the canon requires a brief description of the facts that gave rise to the respective exercise of the actions, the account of which was concluded by the parties, and the formulation of the doubts (§ 2). It also provides that the dispositive part of the judgment will follow, preceded by the reasons on which it is based (§ 3).

Thus, first it describes the identification of the object of the litigation, which often is determined by the fundamental facts, which are essentially the history that occurred prior to the process, the consequences of which are this process, and the subsequent judgment. It is not always merely a factual process, inasmuch as the process can have as its sole object a disputed juridical issue, but the occurrence of certain facts is usually the most common cause originating the process. At this point, the judgment should set forth how these facts were created for the plaintiff, and at times also for the respondent, and the need to formulate specific petitions intended for the judge or tribunal, that they must resolve. But said petitions, in the joinder of issue, became formulations of the doubts (c. 1513), which the judge must answer in order to define the controversy (c. 1611, 1°). This definition must be reasoned in law, although that reasoning (see commentary on c. 1611) must, according to the canon, precede the dispositive part of the judgment.

The canon does not explain how those various requirements of the judgment must be articulated when elaborated, but it can be said that in judicial practice the *form* usually designated as *Roman* has been consolidated, which, in a certain way, follows the logical order that should be

followed in the method for reaching moral certainty (see commentary on c. 1608).

3. After the heading of the judgment, it usually briefly indicates the factual issue determining the object of litigation and the type of process on which the judgment is pronounced. The focus is then on the cause of action, with the formulation of the doubts which the judge or tribunal must answer.

Then, in a separate section from the judgment itself, in the rationale that is usually entitled *in iure*, there is an analysis and presentation of the study of applicable law and once this statement on law is complete, there is, in another separate section, a presentation of what is usually called the *in facto* of the judgment. This section analyzes and studies all the *quaestio facti*, especially an assessment of the facts in the light of the evidence presented. That is why this part of the judgment could often be described as the section devoted to the evidence, from which the judge states the results of the evidence.

At these points (*in iure* and *in facto*) in the judgment document, there is a tendency to conclude the logical juridical operation through the subsumption, with the judge or tribunal noting that these proven facts correspond to the factual assumptions contained in the applicable juridical norm or norms.

The *dispositive part* is presented at the end of these two separate sections of the judgment, as a logical conclusion with which they answer the previously formulated doubts. In the concatenation and order of the arguments on positive law, jurisprudence, and doctrine by the authors, law could justifiably assume those facts that served as antecedents to the process and then, when proven, to the judgment, the dispositive part of which is a logical, duly founded conclusion, a judicial expression of the just solution to the specific case. Here reasons of equity will also come into play and lead the judge to find a fair solution, adapted to the various circumstances of the case.

4. Lastly, the judgment requires its proper date. Canon 1612 § 4, in effect, provides that the judgments must close with an indication of the date and place in which it is pronounced. Although the canon only mentions the day, without referring to the month or year, it must be understood that these two elements in the date cannot be missing from the judgment, inasmuch as they determine the day on which the declaration of the will of the judge or tribunal, the authors of the judgment, is formalized.

Next § 4 adds the necessary requirement of the signature of the judge, if he is the sole judge, or of the judges if it is a collegiate tribunal. Moreover, the signature of the notary cannot be missing under any circumstances, in that he or she is the one who provides public proof (c. 1437) of the authorship of the judgment, of the accuracy of its content in connection with what the judges wanted to declare in the form of a judgment, and

even the date itself incorporated at the end of this document, which is quite unique as a written instrument giving public verification of the will of the judges that is the judgment. This is a document that is prepared within the same cognitive process, inseparable from the written documentation of the case (c. 1472) and the culmination of each judicial instance (c. 1517), when it runs through its entire procedure.

5. Although the canon under discussion is purely formal in nature, its text lacks any threat of nullity (c. 10), which would nullify without any possible discussion any judgment essentially neglecting or violating any of these formal requirements.

Therefore, we must resort to the canonical provisions on nullity of judgment in order to contemplate, from another point of view, to what extent an omission or violation of any of this formal information will incur nullity of the judgment. In c. 1622, 2°–4°, we can see that, in fact, the lack of the motives of the judgment, the lack of the signatures provided by 1612 § 4, the lack of the year, month, day, and place in which it was pronounced, are respectively, according to the previous numeric order, causes of nullity (albeit remediable), of the judgment. It is appropriate to stress that, in connection with the dating of the judgment, the aforementioned no. 4° of c. 1622, unlike c. 1612, § 4, mentions the need for the month and year, which we already stated is assumed in the latter norm, because otherwise the day would be undetermined.

There is no mention whatsoever of the omission of the information that had to be included in what we called the heading, while others refer to it as the preamble of the judgment. Neither is there any mention of the omission of any of the information established by c. 1612 § 2. We believe that if any information is missing and it is not duly set forth in the body of the judgment document, in that it would be an error or omission, in principle, it can be recovered through the procedure of c. 1616 if any of the parties has an interest in the matter's being completed or corrected. Moreover, if the date requirements or any portion thereof, is missing, before a complaint of nullity is filed, 1616 § 1 provides that it be resolved by the method set forth in its text.

We believe that c. 1616 is not a fit procedural instrument for remedying formal defects in the judgment such as those mentioned in c. 1622, 2°, that is, the lack of motives for the judgment, but it is for correcting any other defects without the need to always use the challenge, more radical in its effects, which is the *querela nullitatis*.

However, we have some doubt regarding the lack of the notary's signature in the judgment. In principle, we see no reason not to resort first to the procedure of c. 1616 in order to complete the judgment, but we are faced with the matter of the notary refusing to sign the judgment, for whatever reason, or can no longer sign it, because it is physically impossible or because he or she is deceased. The lack of the notary's signature is

not expressly enumerated among the causes of nullity of the judgment. However, c. 1437 § 1 is emphatic in this respect: any acts not signed by a notary are null.

The judgment, because it is a written document, still belongs to that group of documents that constitute, as a whole, the acts of the process, and it is clearly one of the acts (because it is a written record of the statement of the will of the judges in responding to the formulated doubts), that refer to the substance of the cause (c. 1472 § 1). In our opinion, it is not a nullity in an act that can be corrected as permitted in c. 1619 (c. 1622, 5°), because the judgment itself suffers from the lack of a notary signature. It seems to us, in that rare situation in which the lack of a notary's signature cannot be corrected through c. 1616, the rules of c. 1622, 3° will not govern, as if the notary signature were equivalent to that of the other signatories of c. 1612 § 4.Rather, the absolute nullity will apply, which is provided generally in c. 1437 § 1.Inasmuch as it affects the judgments, it does not fit into the situation described in c. 1622, 5°, regarding remediable nullity.

1613 Regulae superius positae de sententia definitiva, sententiae quoque interlocutoriae aptandae sunt.

The rules set out above for a definitive judgement are to be adapted also to interlocutory judgements.

SOURCES: c. 1875; *NSRR* 139

CROSS REFERENCES: cc. 1426 § 1, 1588, 1589 § 1, 1590 § 1, 1607, 1608–1612, 1661–1663, 1665, 1667–1668

COMMENTARY

Carmelo de Diego-Lora

1. The rules *superius positae de sententia definitiva* must be adapted to interlocutory judgments. In order to identify which of these rules are also applicable to interlocutory judgments, it will be necessary to look at the rules of cc. 1608–1612. Canon 1607 is excluded from the above list of canons, because it only contains the distinction and, in some way, definition of an interlocutory judgment in contrast to the principal judgment (for more clarification, see commentary on c. 1607).

Therefore, the canon refers to formal rules with reference to the route the judge must follow in order to reach moral certitude regarding what is sought in the incidental proceeding that gives rise to the interlocutory judgment (cc. 1589 § 1 and 1590 § 1 in connection with c. 1608). This is true, as well, with respect to the drafting, after the discussion and voting, if the judgment is by a collegiate tribunal (cc. 1609 and 1610 in connection with c. 1426). It also refers to the regulating norms of the internal and external requirements of judgments (cc. 1611 and 1612).

Everything said regarding the final judgment in the commentary on these canons can now be repeated, although it is transferred to the interlocutory judgment. It would be excessive, however, to speak of *definire controversiam*, with the expression of c. 1611, 1°, applying it literally to the interlocutory judgment. But understanding it in its specific context, the incidental proceeding giving rise to the pronouncing of a judgment, this judgment will not fail to define the specific dispute arising through the incidental proceeding that makes a special, preliminary incidental proceeding occur. The same can be said regarding interlocutory judgments if the judge or tribunal admitting the incidental proceeding should decide that it must be resolved through this type of judicial resolution (cc. 1587 and 1589 § 1).

Canon 1590 § 1 goes one step further by providing that if the judge admitting the case decides that the incidental proceeding must be resolved through a judgment, the norms on the oral contentious trial will be followed, unless the judge provides otherwise because of the seriousness of the issue raised.

2. When the judge of the principal case is the sole judge, we can find two types of judgments pronounced in the oral contentious trial. These are principal judgments, pronounced in the principal case that follow the procedure of the expedited ordinary trial, and interlocutory judgments arising from incidental proceedings admitted by the sole judge in the ordinary contentious trial. In order to avoid any type of confusion between the judgments, we would like to suggest that the heading of the interlocutory judgment highlight its particular nature. This means that, among the elements of the heading of the interlocutory judgment, all the information identifying the incidental proceeding in which it is pronounced should also be set forth, and at the same time, the principal case in which said incidental matter arose should also be identified.

3. However, if it is a collegiate tribunal that is hearing the principal case and admitted the incidental proceeding for it to be resolved in the form of a judgment, the fact that the procedure for the oral contentious trial must be followed for its resolution does not mean that the criteria for the sole judge provided in c. 1657 will govern. This would mean that the presiding judge of the tribunal, or the *ponens*, or any of the other judges would have to preside and direct the incidental proceeding until the judgment.

Adopting this position would go against the provisions of c. 1588, which orders that the incidental case must be proposed before the judge that is competent to try the principal case. If this judge is a tribunal, or college of judges, the incidental matter must be proposed before this college and this same tribunal must decide its admission and follow the subsequent procedures.

In these cases, we are obligated to apply competence by jurisdiction of the connection of cases, that of the incidental cause with respect to the principal case, that, for reasons of procedural coordination, provides that the same tribunal (c. 1414) must hear both. This competence proceeds ex officio and cannot be derogated if the parties so desire, nor even on initiative of the judges. The *vis* attractive of the competence of the tribunal of the principal case over the incidental proceeding belongs to the *ius cogens* of the canonical norms of procedure.

In the situations just described, we will find, therefore, the rare situation of oral contentious trials, which, since they served as a procedural instrument for the handling of an incidental proceeding set forth in the principal case submitted to a collegiate tribunal, are resolved through an interlocutory judgment of that college of judges.

In that situation, the references that cc. 1661–1663 and 1665 make regarding the sole judge for the hearing in the oral contentious trial, as well as cc. 1667 and 1668 regarding the oral discussion and preparation of the judgment, must be interpreted as referring equally to the collegiate tribunal. This court will then act by receiving evidence according to its own nature, but, with respect to the formulation of the doubts and the preparation of the judgment, it must still, in any event, act collegially, according to the provisions of cc. 1609 and 1610 § 2. In any case, the decision will be adopted by majority vote by the judges (c. 1426 § 1).

1614 Sententia quam primum publicetur, indicatis modis quibus impugnari potest; neque ante publicationem vim ullam habet, etiamsi dispositiva pars, iudice permittente, partibus significata sit.

A judgement is to be published as soon as possible, with an indication of the ways in which it can be challenged. Before publication it has no effect, even if the dispositive part may, with the permission of the judge, have been notified to the parties.

SOURCES: c. 1876; *NSRR* 142 § 2; *PrM* 199; PAULUS PP. VI, Alloc., 11 ian. 1965 (*AAS* 57 [1965] 235); PAULUS PP. VI, Alloc., 26 ian. 1966 (*AAS* 58 [1966] 155); *SNAS* 58 § 1

CROSS REFERENCES: cc. 1474 § 1, 1596 § 1, 1615, 1625, 1628, 1630 § 1, 1637 § 1, 1639 § 1, 1641,2°, 1644–1645, 1651, 1668, 1682

COMMENTARY

Carmelo de Diego-Lora

1. The *publication of the sentence* meets two different objectives at the same time. First, *it is an act of notification to the parties to the litigation* of the answer (or answers) that the judge or collegiate tribunal pronounces with respect to the doubts that have constituted the object of litigation. The parties thereby acquire knowledge of what, with respect to the rights and interests involved in the judicial controversy, the judge or tribunal has decided, if it is the final judgment.

The word *publication*, which refers to the final as well as to interlocutory judgments, cannot be understood to be similar to publicity. The court does not circulate its judgments. It only makes them known to those who are parties in the process, including the promoter of justice and the defender of the bond, if they acted as such in the process in which the judgment was pronounced. This judgment affects the parties interested in the decision and they are the ones who are interested in knowing its content.

The canonical process is a process between parties, and these parties have the right to know the judgment of which they are the direct recipients. If the judgment contains new juridical statements or constitutions, they will be the ones who are affected, and they must abide by its pronouncements when it is a final judgment. They will be affected by any obligations imposed by the judgment, by complying therewith if it is a

conviction judgment, or in demanding said compliance for their own benefit if it is acknowledged that a party has the right to claim it, and, if these obligations are not met, the right to mandatory execution, for which it may obtain from the competent judge or tribunal, the pronouncement of a decree of execution (c. 1651).

Canon 1593 § 2 also provides that any party that did not appear, or that has not given a reply before the case is decided, can challenge the judgment, and even in certain situations lodge a plaint of nullity (see commentary on c. 1593). The fact that one has been declared absent in a process, pursuant to c. 1592, does not mean that one is no longer a party, although there has been no confronting of the fundamental charges in the process in defense of one's position in the litigation. Therefore, an absent party may challenge a judgment prejudicing him, which obviously means that he must also receive notice of the judgment, at least of its full text, in order to be able to challenge it, pursuant to c. 1614.

The judgments are part of the procedural acts as a whole that give written evidence of all the activities taking place in the process and, as said acts, are subject to the prohibition of c. 1475 § 2, intended for notaries and the chancellor, from handing over judicial records and documents that constitute the process if there is no express order from the judge.

The Norms of the TRR of April 18, 1994,[1] which are more extensive in this regard than c. 1614, in art. 100 § 1, provide that the judgment, once drafted and signed, will be officially notified, in this aspect referring to custom, to the parties and other *interesse habentibus*. In some cases, there could be others who are interested in the notification who are not parties in the strict sense, such as, for example, a third party assisting on behalf of one of the litigants in the case, a phenomenon characteristic of the so-called adhesive intervention (c. 1596 § 1). Moreover, art. 101 orders that the decision be delivered in full to the promoter of justice and the defender of the bond, if they participated in the case. Article 100 § 2, however, prohibits the handing over of any copy of the judgment to outsiders, except by order of the *ponens* or the dean.

Whereas we have just recognized the right of the public and private parties in the process, as well as any third party who justifiably has an interested in knowing it, to be informed of the judgment, in turn, the juridical duty of the judge or tribunal to handle said publication of the judgment must also be recognized. Canon 1614 states *quam primum*. And this same requirement was imposed by c. 1876 of the *CIC*/1917. It is a matter of thereby avoiding, as far as possible, any unjustifiable delays that could in any way violate the interested parties' right to know the judgment.

2. Therefore, the canon also allows that, even if the judgment is not completely drafted, with the authorization of the judge, its dispositive part may be made known to the subjects in the litigation. In fact, this notification

1. Cf. *AAS* 87 (1994), pp. 508–540.

does not have any juridical effect and is still only a courtesy for the parties, established by the *CIC*, in order to satisfy in advance the legitimate desire of the parties to know the conclusion reached by the judge or tribunal in the case. Thus, the interested parties themselves, and especially the losing party, apart from having a legitimate desire satisfied, may begin to consider to possible recourses to lodge against the judgment when it is fully published, and even may take appropriate measures to deal with execution if the judgment is a conviction.

This provision was not included in the *CIC*/1917. On the contrary, in the oral contentious trial, this early notification of the dispositive part of the judgment has been guaranteed, when c. 1668 § 1 so imposes *statim*, that is, as soon as the judge has decided the cause. Canon 1668 §§ 1 and 2 provides that the judgment must be pronounced immediately after the end of the hearing. Only due to the difficulty of the *res* of litigation or for another just cause is the judge permitted to defer the judgment during the period subsequent to termination of the hearing, and this period may be no longer than five working days (c. 1668 § 2).

In any event, c. 1688 § 3 also provides for the oral contentious trial, as already provided in c. 1614, that the judgment be published *quam primum*. It even indicates, for this full notification of the judgment, a term *ad quem* that cannot be exceeded, the latter being a term of fifteen days that we understand must be calculated from the time of the obligatory notification of its dispositive part. It could be believed that, inasmuch as a term has been established for publication of the full text of the judgment, although it is longer than that indicated for the oral contentious trial, the text of c. 1614 had been improved, that just as it had been drafted, it still presents a certain contradiction between the *quam primum*, indicated for full publication of the judgment, and the possibility that, with the permission of the judge, early notification of the dispositive part is authorized.

3. From another point of view, *the notification* is not merely making the judgment and its content known to the parties and other interested parties in the process, but *is also an announcement*, to the extent that c. 1615 indiscriminately uses the terms *publicatio seu intimatio*.

That announcement is especially intended for the party prejudiced by the judgment. Being prejudiced by the judgment grants the party the standing to exercise the right to appeal. The winning party does not have this standing. However, the judgment may agree to only certain requests of the plaintiff and reject others, and this can also occur for the respondent, that it is favored by the judgment in one aspect while prejudiced in one or more others.

Canon 1628 states: *Pars quae aliqua sententia se gravatam putat*. The term *party* must refer to private subjects that are in the process in that capacity, as well as to subjects exercising public office, be they the promoter of justice or the defender of the bond, if they are cases requiring

their presence. They all are the ones who have the *ius appellandi ad iudicem superiorem*, pursuant to c. 1628. Inasmuch as the parties may have been favored or prejudiced in part, a partial appeal of a judgment is also appropriate, as shown in cc. 1637 § 3 and 1639 § 1.

Canon 1614 provides that the ways, if more than one, by which it can be challenged must be indicated with the publication of the judgment. This highlights the nature, together with the notification itself, of the warning or admonition that accompanies this act, after the various recourses available against the judgment are indicated. Its objective is to inform the party that, although it is prejudiced, if it does not lodge an appeal within the term established by c. 1630 § 1, the judgment will be final and unappealable, and the adjudged matter will occur (c. 1641, 2°), excepting first judgments declaring nullity of marriage for which the rule of automatic appeal applies (c. 1682).

The judgment will become final if not appealed in the lawfully established time when the judgment is fully notified, and not when, in advance of its publication, only its dispositive part is notified, in which case the judgment has no effect whatsoever, as established in c. 1614. This advance notification is understood as lacking effect "because it is an unofficial, informal communication, which should preferably be oral in order to avoid ambiguities."[2] It is clear that "preferably" does not mean necessarily, and therefore nothing prevents the notification from being in writing, although in that case it should clearly state on the record that said notification, since it is only the dispositive part of the judgment, has no effect whatsoever, and this should be made known to the recipient of the notification.

The foregoing reference to notification also of the means of challenging the judgment, seems to have been limited to an appeal. And such a specific reference should not seem surprising, because appeals are the normal means of challenging a judgment, until the judgment is final. However, the other recourses, such as the plaint of nullity, which can accompany the appeal (c. 1625), or reinstatement *in integrum* (c. 1645), or the new presentation of the case in cases concerning the status of persons (c. 1644), will still be special recourses operating against the adjudged matter, each within a certain context. They are based on special circumstances justifying at least the admission of these recourses for their processing, therefore, I do not believe that they need to be communicated to the litigants while the judgment is appealable. Only when it is believed that the judgment is unappealable because of its double approval after the appeal, will the situation for publication of a judgment arise accompanied by the appropriate information on other recourses other than an appeal, pursuant to c. 1614.

2. J.L. ACEBAL, commentary on c. 1614, in *Salamanca Com.*

1615 Publicatio seu intimatio sententiae fieri potest vel tradendo exemplar sententiae partibus aut earum procuratoribus, vel eisdem transmittendo idem exemplar ad normam can. 1509.

The publication or notification of the judgement can be effected by giving a copy of the judgement to the parties or to their procurators, or by sending them a copy of it in accordance with can. 1509.

SOURCES: c. 1877; *NSRR* 151; *PrM* 204 § 1; CodCom Resp. II, 25 ian. 1943 (*AAS* 35 [1943] 58)

CROSS REFERENCES: cc. 203 § 1, 1509, 1614, 1630 § 1

COMMENTARY

Carmelo de Diego-Lora

1. Canon 1614 imposes the duty to publish the judgment, which must be diligently complied with by the judge or tribunal that pronounced it. Other provisions are added thereto. One of them imposes that the recipients of the judgment be informed of the means of challenging it that can be exercised. Another provision, which operates through authorization or permission, and therefore as a discretionary faculty of the judge, makes it possible for the parties to be notified, in advance of publication of the full text of the judgment, of its dispositive part, without prejudice to subsequent full publication of the judicial decision.

Canon 1615, however, contains a purely procedural norm regarding how said publication must actually take place. This canon uses the terms *publicatio seu intimatio*. But, in our opinion, these terms can be substituted by a more technically accurate term, "notification," because the publication or warning is intended for certain subjects. Although, for the party prejudiced by the judgment, said notification can mean a special notice for said party to lodge any challenge it deems appropriate and lawful in each case, what nonetheless prevails in this canonical norm is the way to communicate to the litigants official notice that the judgment has been pronounced and what the statement of the will of the judge is, expressed therein.

2. Canon 1877 of the *CIC*/1917 strictly established three methods of notification (*publicatio*, according to this canon), of the judgment: a very solemn one consisted of the reading of the judgment by the judge seated in the tribunal, after summoning the parties to be present at the act. Another less solemn method, but which offered proof certain of the way it was carried out and made known to the interested parties, consisted of

notifying the parties that the judgment was in the chancery of the tribunal, where they could read it and request a copy. It was necessary that this type of notification be recorded in the acts of the cause, as the term for filing an appeal, pursuant to the now-derogated c. 1881, was counted from when the prejudiced party received notice of the publication of the judgment. A third more informal method, was through public, certified mail with acknowledgment of receipt, in the same manner as in judicial summons, when it involved long distances.

What is particularly important in this type of communication of the proceedings, especially when it involves publication of the judgment, is that the date as of which the term for appealing begins must be stated with certainty, and the judgment must be made known to the recipient accurately, in its own complete verbatim text. Any of the methods indicated by the *CIC*/1917 were suitable for the two aforementioned objectives to be fulfilled. However, the new *CIC*, from its original *schema*, opted for just one of them, abandoning the most solemn method and the other less solemn method, which nonetheless also gave sufficient evidence of notification that the judgment was at the disposal of the parties in the chancery of the tribunal. In both methods the day *a quo* for calculating the term for appeal was very precise. In the current method of publishing the judgment, that initial day of the term for appeal seems vague.

3. Canon 1615 proposes a means of communication for publishing the judgment, which consists of submitting a copy thereof to the parties or their procurators. In this case, we understand that the date of delivery is the date that will indicate the day *a quo* for calculating the fifteen working days for the appeal (c. 1630 § 1), according to the criteria provided by c. 203 § 1. In this situation, the date of publication will be understood to be the same day the party or its procurator receives a copy of the judgment.

However, the canon offers another method of publication, which consists of sending a copy by public postal service pursuant to the provisions of c. 1509 § 1 for notification in general, among which the canon itself includes summonses, decrees, judgments, and other judicial acts, without more specification. There is not a public postal service in every area where the *CIC* is in force. Therefore this method could not be the only one, and the canon had to offer another option for notification: *vel alio modo qui tutissimus sit*. But in neither of the two options does the canon state anything about what was provided by c. 1719 *CIC*/1917, in trying to avoid certain information from going unnoticed for the official summons, namely, that this notice would be send by certified mail with acknowledgment of receipt. Undoubtedly, certification of this date of receipt is essential for specifying the day on which calculation of the term begins for exercising any appropriate legitimate means of challenge.

The *CIC*, nonetheless, in this regard has not wanted to establish a sole binding criterion for guaranteeing that the notification has been properly carried out, a method that also gives proof certain of the date it was

made known to the recipient. The variety of places where the *CIC* is in force has caused the canon to refer, for full regulation of notification, to any peculiarities that may arise in each place in this regard, it completes canon 1509 § 1 with the words *servatis normis lege particulari statutis*. The authors, in § 2 of the same canon, seek to emphasize that these guarantees that notification took place and the way it was done, must be evidenced in the acts of the proceedings. This warning, in the middle of that general reference to what particular law establishes in each tribunal, would have been more technically correct if it had also required that the records reflect not only that notification took place and the way it was done, but also the date (day, month and year) on which said notification reached the recipient.

Perhaps the uncertainties that could be involved in this reference to particular law explain why at the session of the consultors on December 13, 1978,[1] one of them proposed, without acceptance by the others, another way of publishing the judgment, perhaps more classic and in keeping with the traditional solemnity of procedural law, which was the summoning of the parties before the judge, seated in the tribunal, in order for them to hear the reading of the judgment. That idea was not taken up in the *CCEO* either, c. 1192 §§ 1 and 2 which almost copies verbatim the text of the canon of the *CIC* under discussion.

4. When this c. 1615 regulates the method for notifying of the judgment, it refers to all types of judgments, be they final or interlocutory. Although c. 1613 specifically refers to the norms set forth in the preceding canons, we understand thatthere is nothing to prevent it from also being applied to the following canons when it refers to judgments in general, unless they have some specific characteristic requiring special treatment, be it a final or an interlocutory judgment. Moreover, this applies equally to what c. 1614 provides for the publication of the judgment, which in our opinion, constitutes with c. 1615 one unit that could have been combined into just one canon, albeit separated into two paragraphs.

However, Arroba[2] states that when they are interlocutory judgments, the need to notify of the means of challenging the judgment, along with the text of the judgment, no longer applies, because these judgments can be reversed or amended by the judge before the principle cause is concluded. This would mean, in our opinion, that interlocutory judgments would not be appealable in any case, except as allowed by c. 1729, 4°, by which they are susceptible to appeal when they have the force of a definitive judgment (for this distinction, see commentary on c. 1618).

Therefore, we conclude that if the judge or tribunal, when pronouncing an interlocutory judgment, advises that it will have some effect with the force of a definitive judgment, any means of challenging the judgment

1. Cf. *Comm.* 1 (1979), p. 142.
2. Cf. M.J. ARROBA, *Diritto processuale canonico* (Rome 1993), p. 424.

that he believes can be exercised must be added to the notification. This will occur without prejudice to any omissions that may arise in this regard, or to any options for a procedural response that the parties may have in connection with the specific ruling that the judge issues, as to whether the interlocutory judgment that he pronounced has, and to what extent, the force of a definitive judgment.

1616 **§ 1. Si in sententiae textu vel error irrepserit in calculis, vel error materialis acciderit in transcribenda parte dispositiva aut in factis vel partium petitionibus referendis, vel omissa sint quae can. 1612 § 4 requirit, sententia ab ipso tribunali, quod eam tulit, corrigi vel compleri debet sive ad partis instantiam sive ex officio, semper tamen auditis partibus et decreto ad calcem sententiae apposito.**

§ 2. Si qua pars refragetur, quaestio incidens decreto definiatur.

§ 1. A judgement must be corrected or completed by the tribunal which gave it if, in the text of a judgement, there is an error in calculations, or a material error in the transcription of either the dispositive part or the presentation of the facts or the pleadings of the parties, or if any of the items required by can. 1612 § 4 are omitted. This is to be done either at the request of the parties or ex officio, but always after having consulted the parties and by a decree appended to the foot of the judgement.

§ 2. If one party is opposed, an incidental question is to be decided by a decree.

SOURCES: § 1: c. 1878 §§ 1 et 2; *NSRR* 145; *PrM* 205 § 2
§ 2: c. 1878 § 3; *PrM* 205 § 3

CROSS REFERENCES: 1474, 1587–1589, 1590 § 2, 1613, 1615, 1622,3°–4°, 1626 § 2, 1630, 1634 §§ 2–3, 1651, 1652

COMMENTARY

Carmelo de Diego-Lora

1. In this canon, in § 1, we can foresee the situation in which the judgment has a material error, and it regulates the method by which the judge or tribunal that pronounced it must correct it.

This is not a means for challenging the judgment. These means are regulated in part II, sec. I, tit. VIII; and *restitutio in integrum* in the following tit. IX.The way to correct a judgment is found in tit. VII, among the canons on judgments and decrees.

Nothing could be more unlike a means for challenging a judgment than the judicial act whereby its own author wishes only to express in the best way possible his true and accurate statement of will in the case,

freeing said judgment from material defects that in some way obscure the meaning intended therein, or correcting material omissions, which should be present in the written document.The means of challenging, however, as the term itself indicates, are intended to render partially or fully without effect what is decided, be it through a revocation of the judgment (appeal), or through nullity (plaint of nullity of the judgment), be it through rescission for specific reasons and the need for a new judgment to be pronounced through the judicial body (through reinstatement *in integrum*).

In this case, it is simply an initiative for the improvement of the judgment, without adding or subtracting anything that was not already in the mind of the judge or tribunal that pronounced it. This displays the aptness of the organization of the new *CIC*, compared to the *CIC*/1917, which had placed its regulation as the first canon (c. 1878) of a general title named *De iuris remediis contra sententiam* (tit. XIV). This canon is followed by the recourses we now call *De impugnatione sententiae*, some included in subsequent chapters within the same title, and another, that of reinstatement *in integrum*, situated in the following title (XV). Today, however, the uniqueness of the correction of the judgment places it in the organization of the *CIC* as the last finishing touch on what we could generically refer to as the judicial activity of the elaboration of the judgment.

2. Canon 1878 § 1 of the *CIC*/1917 expressly described the function characteristic of this judicial activity: *errorem corrigere valet ipse iudex* are its last words. The new *CIC* describes the function of this activity with the words *corrigi vel compleri debet*. It should be understood to be by the same judge or tribunal that pronounced the judgment, as can be seen by the words *sententia ab ipso tribunali, quod eam tulit*. Not only are definitive judgments corrected or completed, but also interlocutory judgments. As has been stated regarding this latter kind of judgment, "it can also be corrected under the same terms under which a definitive judgment can be corrected"[1] (see commentary on c. 1615 regarding the application to interlocutory judgments as provided in c. 1613, not only with respect to the canons prior to this c. 1613, but also to the subsequent ones, provided that there is no special norm therefor that is incompatible with the norms related to the definitive judgment).

The need for this corrective function, according to c. 1616 § 1, can come: *a*) from an *error in calculations* made in the judgment; *b*) from a *material error* in the transcription of the will of the judge or the collegiate tribunal, in connection with the words by which the dispositive part of the judgment were expressed; *c*) from that *lack of agreement between the intent* of the judge or collegiate tribunal and the *written text* of the judgment affecting the presentation of the facts or the petitions by the parties, provided that said disagreement between the internal will of the judge and the written declared will does not exceed what could also be described as

1. J.J. GARCÍA FAÍLDE, *Nuevo Derecho procesal canónico* (Salamanca 1984), p. 188.

a mere material error, inasmuch as this is not a procedure for modifying or correcting material errors in the judgment, but just a mere correction of what was equivocally expressed in the judgment through an improper use of words; and *d*) the correction may also be made *in a supplement* to what necessarily had to be set forth in the judgment and was omitted because of haste, lack of attention, urgencies, etc., in the drafting of the judgment, in this situation, the canon refers to the omission of one or more date requirements in the judgment enumerated in c. 1612 § 4.

Said omissions in the judgment (see commentary on c. 1612) are causes of remediable nullity pursuant to c. 1622, 3°–4°. These situations were already established as causes of nullity in c. 1894, 3°–4° of the *CIC*/1917, but the sanction of nullity, albeit remediable, really appeared to be too rigorous an effect for what could simply be an innocent mistake that could easily be corrected through a simpler method. And this is what the current c. 1616 § 1 has accomplished, bridging a gap clearly evident in c. 1878 of the *CIC*/1917 (see last paragraph of the commentary on c. 1612, in connection with the situation in which the notary signature is missing without the possibility of fulfilling this requirement).

3. The *procedure* to follow in order to make these corrections requires: *a*) in the event of a case prompted by public interest or private interest, it must be preceded by the *initiative by a party* or the *ex officio initiative* by the same judge or tribunal that pronounced the judgment (this latter possibility was not included in c. 1878 *CIC*/1917); *b*) in either case the parties must be summoned to be heard by the judge or tribunal receiving the petition for correction, at whose initiative ex officio there is an attempt to make said correction. The canon says *auditis partibus*, which suggests an oral hearing by the judge in the presence of both parties, if they appear, but this does not prevent it from being in writing if the judge or tribunal determines that there is enough time therefor and the correction deserves to be considered more carefully; *c*) the correction must be decided by the judge or tribunal by decree after the hearing with the parties if both accept the correction or do not appear; *d*) this decree may or may not present the reasons, at the discretion of the judge or tribunal, and they will be set forth in writing *ad calcem* (at the bottom of) *sententiae apposito*.

If, however, one of the parties *objects to the correction* § 2 of the canon also provides that the incidental question will be decided by decree. However, when this canon refers to "the incidental question," it still refers implicitly to the procedure set forth in cc. 1588 and 1589, with the condition, in its application, consisting of the fact that the judge or tribunal admitting the correction will have to decide to resolve it by decree, because by rule of law the judgment form is excluded, and therefore the procedure of the oral contentious trial will never be followed.

It must be recognized that this incidental question still has a quality that profoundly distinguishes it from the concept thereof set forth in c. 1587, by which the incidental question, is characterized, because it

usually must be resolved before the main question. However, in the situation we are considering, an incidental question is considered which in a certain way departs from the canonical model, although this model is not objected to, because in most cases it does not prevent the uniqueness of a different hypothesis, such as the one we are analyzing in this commentary.

Moreover, when, in c. 1616 § 2 it is determined that *if there is an objection, it must be decided by decree,* the incidental question is thereby subject to the provisions of c. 1590 § 2. This would mean that, if a collegiate tribunal pronounced the judgment, an auditor or the ponens could decide the question. However, we believe that when it is an incidental question that, if decided favorably, it would affect the literal terms that are specifically set forth in the judgment, the one to correct it *can be none other than the same body that pronounced the judgment (ab ipso tribunali,* according to c. 1616 § 1). We believe that said decree, in that it is pronounced in a limited disagreement, arising from the opposition of one of the parties, must also be a *decree with reasons,* by which the parties are given the reasons on which said decision is based. This reasoning is more justified if, when the definitive judgment is challenged through an appeal, the decree deciding the incidental question arising from opposition to correction of the judgment is also appealed at the same time, in order that the appeals court be informed of the reasons for the decree. In these cases, however, it is hard to imagine the possibility of an appeal independent and distinguished from the decree itself when the definitive judgment is not also challenged, inasmuch as acceptance thereof in turn entails acceptance of what is decided therein, but also acceptance of what the judge or tribunal decided in the incidental question regarding correction of said judgment, if any.

Lastly, the problem arises regarding at what *time* it can be raised by the party or when the judge can proceed ex officio to *correct the judgment.* Garcia Failde believes that the judge does not stop being a judge in the case when judgment is pronounced, in that he continues to be one when he continues to do in the case "everything that is designed to bring the case to the best outcome and he can do this without interfering in the consideration of the merits of the case."[2] In fact, we fully agree with this opinion, which is made quite clear from the subsequent acts of the judge in the execution phase, as evidenced in cc. 1651–1652. However, if the judgment is appealed, the petition for correction of the judgment can only be filed before the appeal, because once the appeal is admitted by the judge or tribunal *a quo* (c. 1630), its jurisdiction over the process in which it pronounced judgment ceases *ipso facto*: hereinafter its activity is reduced to issuing certification of the judgment and sending the acts to the appeals judge pursuant to c. 1474 (c. 1634 §§ 2–3).

2. Ibid.

When an appeal is filed, all proceedings on the pending case belong to the judge or tribunal of the competent higher level. And this explains why the same judge who pronounced it can no longer amend or retract ex officio the judgment in which, after it is appealed, he notices a defect of nullity (c. 1626 § 2), even if this defect is his own fault.

1617 Ceterae iudicis pronuntiationes, praeter sententiam, sunt decreta quae si mere ordinatoria non sint, vim non habent, nisi saltem summarie motiva exprimant, vel ad motiva in alio actu expressa remittant.

Other pronouncements of a judge apart from the judgement, are decrees. If they are more than mere directions about procedure, they have no effect unless they give at least a summary of their reasons or refer to motives expressed in another act.

SOURCES: cc. 1840 § 3, 1868 § 2; *NSRR* 113, 135 § 2; *PrM* 193, 196 § 2; PCIDSVC (*AAS* 66 [1974] 463)

CROSS REFERENCES: cc. 10, 124 § 2, 125, 126, 153 § 3, 193 § 3, 1428, 1437 § 2, 1452–1453, 1458, 1463, 1484, 1507–1509, 1513–1514, 1516, 1527, 1534, 1557, 1581 § 2, 1587, 1589 § 1, 1590 § 2, 1591, 1600, 1607, 1620, 1622, 1629,4°, 1659, 1661, 1677 § 1, 1682 § 2

COMMENTARY

Carmelo de Diego-Lora

1. The canon gives the name *decrees* to all other pronouncements by the judge that are not judgments. This term and the same provision were already in c. 1868 § 2 of the *CIC*/1917. However, that former canon § 1 of which is the precedent to the current c. 1607, did not contain any other reference to decrees, nor was there any such reference in the canons of tit. XIII (book IV, part I, sec. I), dedicated completely to judgments, as stated in the heading itself.

Therefore, c. 1617 is a completely new canon, which also distinguishes two types of decrees: some, called mere directions about procedure, do not need any reasons, and others must have the reasons.

The process, from its beginning to the definitive judgment, throughout all its proceedings, is formally a series of procedural acts that take place and unfold under the presiding, direction, and authority of the judge. The judge is present from the first moment (c. 1446 §§ 2–3); he has the powers to direct the process, as evidenced in cc. 1452 and 1453; he is in charge of the order in which the cases must be heard (c. 1458); he admits the petitions and counteractions (cc. 1505 and 1463); he transfers the petition, ordering that the respondent be summoned (cc. 1507–1508); he summons the parties and formulates the doubts that will constitute the object

of the litigation (c. 1513); he establishes the appropriate time for the parties to present and complete the proofs (c. 1516); and he presides over and directs all evidentiary activity and the subsequent procedural *iter,* until at the end of the proceedings he pronounces the judgment.

There are so many references to the judge in book VII that, if we tried to list the occasions on which the judge or the tribunal is mentioned, the list would cover almost all the canons of this book. If it has been said that the course of the process consists of the procedural acts, it should be added that it is the judge (as merely the principal at times; at others, while still being the principal, as the driving force; at others, as the receiver),who is continuously present at all these acts, and without his intervention the process would not even begin, or ever advance towards its final resolution. And the most common way he has of acting is through various declarations of will, some of greater importance than others, which when not expressed in the form of a judgment, are called decrees.

2. Let us begin with what the canon describes as *mere directions about procedure.* These decrees can be:

a) *Decrees admitting* petitions. The most important petition is the one contained in the libellus of the lawsuit, but the decree admitting the counteraction is of a similar nature. The petitions throughout the process can be quite varied: they can result from the filing of procedural exceptions by which there is an attempt to bring the process to a halt by highlighting some formal defect entailing nullity of the proceedings, or a deficiency in the formation of the procedural relationship, because it lacks the procedural presuppositions required for the process to begin. They can be petitions related to the terms and time periods, as well as extensions of these terms, or petitions for proposed evidence to be admitted, or petitions arising from the filing of incidental causes, etc.

b) *Decrees regulating or expediting the process.* In fact, every merely procedural decree still influences the regulation of the process and its progress towards the judgment. For example, a decree admitting certain evidence in turn entails a subsequent determination of the completion of that evidence and a step forward in the process. A decree of publication of the case has as its consequence the step forward that entails entering into said phase, and will determine the manner and time in which the evidence is to be published.A decree concluding the case at the same time that it closes a given procedural cycle, originates the proper juridical situation for the parties to in turn further the process by using the terms set for the final arguments, and so forth.

c) *Decrees ordering transfers* (to the parties, or one of them, to the witnesses or experts) often accompanied by notification, such as subpoenas, summons, calls to the presence of the judge for given activities or for the hearing of evidence, etc. (cc. 1508–1509, 1514, 1534, etc. for the ordinary trial; in the oral contentious trial cf. cc. 1659–1661, etc.)

3. These merely procedural decrees *do not require the reasons on which they are based.* They are reduced to a mere order that the judge pronounces on some specific matter in the case. Often these orders do not entail anything but the application or exercise of canonical norms. This means that said decrees, by virtue of the simplicity with which they are expressed and the lack, before they are pronounced, of any specific opposition resulting in a less brief contentious process, do not need that argument that should give prestige to the authority that is linked to the juridical foundation.

They do not need this argument not because they are acts of decision submitted solely to judicial discretion, but generally because they are very directly subject to the canons regulating the procedure, as well as, to a large extent, the very nature of the judicial function as the regulator and moderator of the process. But, like all procedural acts, each of these merely procedural decrees implicitly includes the presence of the judge with the parties, in the procedural relationship in which they are situated. Therefore, the parties will always enjoy the juridical power to challenge this type of decree if either of them finds that it is not in accordance with canonical norms regulating the procedural measure.

When there is a challenge of this type, an incidental question will arise, ordinarily from those that are decided by decree (c. 1589), although when being decided, it must be by an explanatory decree. For this reason, it can be said that merely procedural decrees *are not decrees needing express reasons*, but are always, nonetheless, explanatory decrees, because they are *supported by law* as well as by the power of the judge, such that, as long as they are not challenged, shall be deemed pronounced pursuant to procedural law.

Incidentally, when discussing c. 245 (*novus*) of the first *schema,*[1] of c. 1617, one consultor expressed the desire for the decrees to also include an indication regarding the means by which they could be challenged. The initiative was not successful because it was believed unnecessary, in that said indication belonged solely to the substantive aspects of the process.

4. Consequently, in merely procedural decrees, the *form* is also *very simple.* The judge will use therein *the words needed to express his will.* In the body of the document in which the decree is set forth, mention will be made of the *name* of the person holding the judicial office *who is pronouncing it, the cause in which it is pronounced* will be clearly stated, the *procedural period* in which it occurs will be indicated, and then the *dating*, that is, place, day, month, and year in which it is pronounced, to which the judges will affix their signatures as the authors of the decree, and that of the notary, which certifies the act (c. 1437 § 2).

1. *Comm.* 11 (1979), pp. 143–144.

It should be noted that this type of decree does not always have the competent judge as its author. Within the limits provided by the canons, the auditor can pronounce them if the judge or tribunal has so designated (c. 1428), which at times even in collegiate tribunals can be reserved for their president or *ponens* (c. 1677 § 1).

Article 68 of *PrM* thoroughly described the faculties of the presiding judge of the court, showing the various occasions on which decrees can be pronounced in the course of the nullity of marriage process. Moreover, the *NSRR*, of April 18, 1994,[2] highlight the varied leadership functions of the process that devolve upon the *ponens*, the designation of which for each cause is made by the dean of the tribunal at the same time that the respective Rotal *terna* is constituted (art. 18 § 4). At the same time, this office of the tribunal coincides with the exercise of the office of the presiding judge of the duty (art. 21). Beginning with the admission of the petition at the first instance (art. 55 § 1), this judge is continually mentioned in the specifications of these norms, which are presented establishing the doubts in the joinder of issue (art. 57), in the parties' attempt to reconcile (art. 61), or in handling the instruction of the case (for which a judge of the same Rotal *terna* can be designated, except for the instruction of a penal case, in which case the dean of the tribunal must appoint a judge outside the *terna* [art. 71]), until the drafted and signed judgment is fully delivered to the chancery to be notified to the main parties and other interested parties (art. 100).

Even if they are not in the code, these *NSRR*, as those of *PrM* (although the extent to which the latter have been repealed by c. 6 is questionable) nonetheless can be helpful in understanding to what extent the presiding judges of a collegiate tribunal can direct and guide a process being heard in their tribunal through directing decrees.

5. *Decisive decrees*. In contrast to directory or merely procedural decrees, there are other decrees, *which must be explained*, that is, *based on law, starting from a factual situation capable of being assumed by the canonical system*. In fact, these were the decrees regulated by the norm of c. 245 (*novus*) of the *schema*, but, when its text was submitted for discussion by the consultors, the phrase *quae si mere ordinatoria non sint*[3] was added, by which the merely procedural decrees are excluded from the need for reasons, which is the proviso that has prevailed in the final draft of c. 1617.

These decrees, which we usually describe with the adjective decisive, have their origin in specific issues that come under dispute in a particular way, with very concrete objects, on which, in the procedural *iter*, and therefore they are interlocutory, the judge must adopt a specific decision

2. *AAS* 86 (1994), pp. 508–540.
3. *Comm.* 12 (1980), p. 143.

before pronouncing the definitive judgment. They usually belong to the realm of incidental matters (c. 1587), in which the judge, when admitting them, must determine in advance if they were decided by decree or by interlocutory judgment (c. 1589 § 1). If he chooses the former, before the decree is pronounced, the parties must be summoned to a limited contentious hearing, which ends with an explanatory decree. This decree may even be pronounced by an auditor or the president of the tribunal (c. 1590 § 2).

There are also certain decrees that, although they do not resolve disputes in incidental matters, nonetheless cause *prima facie* situations of defenselessness because they rule out areas of legitimate protection that the parties believe they have. This usually occurs with denial of petitions presented by the parties to the judge. This would involve rejection of the *libellus* of the lawsuit (c. 1505), rejection of the counteraction filed (c. 1463 § 1), denials of lawful evidence proposed within the established term (cc. 1527 and 1557), refusal to allow private experts access to the acts of the case or to attend the expert testimony (c. 1581 § 2), rejection of incidental matters submitted (c. 1584 § 1), evidentiary motions after the conclusion of the case (c. 1600), and so on.

The admission of petitions always involves the offering of rights to the party, by opening new space subject to the discretion of the judge in the definitive judgment For this reason, *admission decrees* and decrees accepting motions by a party generally *do not require any explanation*, because of the opening and stimulus they provide for the procedure, creating a wider scope in its progress towards justice. The rejection of requests, however, made in the complaint and throughout the *iter of the process*, in some way closes that open path to justice in the specific case. That *denial* of the request *closes or puts limits on the judge's work*, and the judge, by proceeding in this way, must set forth the reason for the denial in the respective decree.

6. *The explanation is the guarantee of the justification of the judgment*, expresses its consistency with the facts and with applicable law, proclaims that the work of administering justice is the result of the prudence of the judges, of their knowledge of the reality of the facts to be judged and the applicable law. It is also an opportunity for the judge, taking into account the circumstances, to know how to adapt the juridical solution to the demands of equity. *This same attitude must be maintained in view of deciding decrees*, although, since they have a limited object, they will not need as broad an explanation as the judgment, especially the definitive judgment, by which the juridical questions of the case in chief are decided. Therefore, for deciding decrees, it is sufficient for them to at least summarily express the reasons: *saltem summarie motiva exprimant*. This does not mean that the reasoning of these decrees must always be thus, in a summary form. It should be understood, rather that the requirement of the canon regarding the explanation is so strong that it is

always imposed, although at the same time it does not prevent this type of decree from at times having less need for an explanation, for which it allows this reasoning to be simplified as appropriate.

The canon also allows the reasons to not be included at times, as an explanation of the facts and the law, in thebody of the decree, provided that the decree refers to *reasons already set forth in another act.* We should understand *procedural act in the same case*, because anything outside it is not known to the jsudge, unless it has been incorporated into the case at least through certification. In order to refer to these acts, however, it is not necessary that these acts including the reasons on which the decree is based, be acts of the judge. The parties, or their advocates, in the course of the process, may make juridical statements to which the judge may refer in this decree regarding his rationale. Moreover, that reference can be to statements by either of the parties, or to conclusions of the expert evidence, or the juridical statements or information contained in a public or private document that, once incorporated into the process, the judge recognizes as true, etc. All these means can serve to explain the judgment. Thus it is appropriate to refer to said reasons set forth in the decree.

In the case of an appeal, the motivation can also refer to the same reasoning of the appealed judgment if it is upheld. This new canon, it is said, has repealed the response of the PCIDSVC of February 14, 1974,[4] which required that any decree pronounced by the tribunal of appeal in cases of nullity of marriage (now c. 1682 § 2) ratifying the nullity pronounced in the first instance, needed, under the threat of the sanction of nullity, to express the reasons for its decision. Acebal maintains, without hesitation, that with c. 1617 said "response is repealed."[5] Other authors have expressed this same opinion.[6]

In our opinion, the nature of the decree of c. 1682 § 2 is still unique and atypical. It can even be stated that it bears no similarity to the explanatory decrees referred to in c. 1617, which are better placed in the context of interlocutory pronouncements, by including under the same positive norm merely procedural decrees and the decisive or explanatory decrees. The decree confirming the first judgment of nullity, pronounced by the tribunal of appeal, in confirming the judgment, gives it consistency and, once the litigating spouses are notified, they thereby change their status and can remarry. In the cases of the application of c. 1682 § 2, following the precedent of *CM*, VIII § 1, the decree form is chosen, in our opinion, rather because a quick procedure is followed that, due to the importance of the judicial resolution that is to be pronounced, this resolution has the

4. *AAS* 66 (1974), p. 463.
5. J.L. ACEBAL, commentary on c. 1617, in *Salamanca Com.*
6. Cf., e.g., J.J. GARCÍA FAÍLDE, *Nuevo Derecho Procesal Canónico* (Salamanca 1984), p. 167.

effect of a definitive judgment, confirming the nullity under appeal. This is quite different from the results of a mere decree, even if it is explanatory, the function of which is usually designed to resolve incidental matters of limited importance, because the more important ones require the procedure of the oral contentious trial and will be decided by interlocutory judgments.

All the reasons just given, and some more that could be added, in our opinion justified the PCIDSVC response of 1974. However, in spite of the foregoing, when during the *CIC* reform, c. 245 (*novus*) of the *schema* was discussed, this response was taken into account, by which it was then required that, *ad instar sententiae, justificationnes in iure et in facto contineat decretum.* On this occasion, within the *Coetus* of consultors, there was opposition to eliminating the words allowing, in the reasons for the decree, reference to those expressed in another acts, because it was understood that this reference was sufficient to satisfy the requirement in the response of the PCIDSVC. That is, in this way the decree continues to also express the reasons on which it is based. It is also evident from the statement by the consultors: *Ceterum novus canon respicit ius condendum, non ius conditum.*[7]

7. The *form in which the deciding decree must be drafted* is not determined. In our opinion, *first*, under the denomination of the type of judicial resolution that is pronounced, that is, *Decree*, the name and the identifying information of the judge, court, auditor or president of the collegiate body pronouncing it will be invoked. *Second*, there will be a description of the type of incidental matter presented, with a clear indication of the object of the process submitted to the judicial decision. *Third*, there will be an indication whether the issue was raised at the instance of an interested party, with the respective reference to whether there was any opposition by the other party, or ex officio by the same judicial organ, with a hearing with the public or private interested parties. *Fourth*, the dispositive part will be made in response to the object of the proceeding. *Fifth*, reasons for the decision, in law and in fact, if any, will be given. *Sixth*, place, day, month, and year will be stated in which it is pronounced and signed by the author (or authors) of the decree and of the judicial notary. As indicated previously, and as a consequence of the discussion in the Commission of consultors, the means by which the decree can be challenged will not be indicated.

It is worth noting the *issue of the value that the aforementioned procedural forms can have* for the explanatory decree. It can be said that none of them is decisive in affirming nullity due to a violation of a legal requirement, inasmuch as these are not set forth as particularly required. Especially when these decrees are normally pronounced in incidental

7. Cf. *Comm.* 12 (1980), p. 143.

matters, and therein c. 1591 provides that, before the principle cause is completed, the judge or tribunal can revoke or amend, *iusta intercedente justificationne.* the decree or interlocutory judgment, after hearing the parties, be it acting ex officio or at the instance of a party. If faced with any problem that may arise with respect to said decrees, the judge or tribunal has broad discretion to pronounce other decrees, be they declaring the previous decrees or complementing them, be they revoking them, replacing them with a new decree.

The *issue*, on the other hand, requires certain reflection when *what is omitted is the reasoning*, regarding which c. 1617 says that without them these decrees *vim non habent.*

The judge or tribunal, if faced with an omission, if it is discovered, and provided that the case has not been decided in the instance, can always pronounce a new decree, repeating the previous one, but adding thereto the reasons that were lacking. The parties, however, should be notified thereof in the event that they have anything to argue against it, or, if the tribunal believes that it has the force of a definitive judgment, in case they wish to appeal it (c. 1629, 4°, *contrario sensu*).

The words *vim non habent* do not refer, in our opinion, to nullity, which would require express mention in the law (c. 10), but it does not mean that in these cases the decree has a presumption favoring its validity (c. 1243) because it lacks the only formal requirement of the canon. Nor do we believe that this situation can be analogous to any of the phenomena of rescission of juridical acts in general as in cc. 125 and 126, nor can they refer to the causes of nullity in cc. 1620 and 1622, inasmuch as these norms are specific for judgments.

Simply stated, *such decrees lacking reasons have no force*, that is, *they lack any effect.* Therefore, the judge or tribunal cannot require that the parties comply with the mandate (or mandates) contained in the decree, nor can any of the parties demand that the effect that those mandates contained in the decree would require compliance or take effect. Along the same lines, should certain juridical situations arise as a consequence of those decrees, those situations would not take place.

Consequently, in these cases, we have a general phenomenon of the ineffectiveness of the juridical acts, which, similarly, can occur in certain private juridical acts, such as, for example, a mandate *ad lites* given to the procurator but not presented before the tribunal (c. 1484), can also occur in juridical acts of a public nature, such as the promise made by an ecclesiastical office (c. 153 § 3), or a transfer of public office not notified in writing (c. 190 § 3). In the same way, any decree that, not being merely procedural, lacks reasons, nor even refers to reasons already set forth in another act recorded in the acts of the process, is ineffective.

1618 **Sentencia interlocutoria vel decretum vim sententiae definitivae habent, si iudicium impediunt vel ipsi iudicio aut alicui ipsius gradui finem ponunt, quod attinet ad aliquam saltem partem in causa.**

An interlocutory judgement or a decree has the force of a definitive judgement if, in respect of at least one of the parties, it prevents the trial, or brings to an end the trial itself or any instance of it.

SOURCES: *PrM* 214 § 2

CROSS REFERENCES: cc. 1459, 1461, 1462 § 1, 1505 §§ 2 et 4, 1517, 1520–1523, 1524–1525, 1587, 1589 § 1, 1590 § 1, 1591, 1594,2°, 1607, 1613, 1617, 1629,4°, 1634, 1637 § 2, 1642 § 2, 1690

COMMENTARY

Carmelo de Diego-Lora

I. The last canon of tit. VII, dedicated to pronouncements of the judge, is completely new. There was no similar canon in the *CIC*/1917, nor did the original *schema* of the new *CIC* even include a provision like that of this canon.

This title sets forth a clear distinction (see introduction to tit. VII) between *definitive judgments* and *interlocutory judgments*. In the other pronouncements by the judge, regarding the decrees, distinction is made between *merely procedural decrees* or *order decrees* and *decisive or explanatory decrees*, all of them being interlocutory (see commentary on cc. 1607 and 1617 respectively). *This c. 1618 introduces a subsequent and last distinction: interlocutory judgments and interlocutory decrees with the force of a definitive judgment* (“*vim sententiae definitivae habent*,” reads the provision), in contrast to other judgments and decrees lacking this force. In short, we could say that they lack the efficacy characteristic of a definitive judgment. From this point of view, the canon shows us a type of intermediary category of judicial resolutions and pronouncements that falls between the definitive judgment and other pronouncements that are also interlocutory and lack this type of force, *vis*, states the canon, or, perhaps better stated, efficacy.

Canon 1607 states what a definitive judgment is: a judgment that decides the case-in-chief. This canon also states what an interlocutory judgment is, namely, that which decides an incidental matter. It is not a

question of mere form or the outward expression that distinguishes one from the other, inasmuch as the manner of developing them, and even drafting one and the other, do not have any reason to be distinct formal manifestations (c. 1613). However, intrinsically, they are very different, according to what they decide. The judgment will be definitive if it decides a main cause, ending the proceedings, and it will be interlocutory when its pronouncement precedes that of the main judgment, settling a specific issue arising between the parties, not expressly included in the libellus of the lawsuit and requiring a specified decision (c. 1587).

Therefore, the distinction does not lie in the form, but in the fact that the judgments play different roles and formalize different types of declarations of the will of the judge, by which they handle and respond to different objects of litigation. And they affect the process with different efficacy and also at different stages in the proceedings.

Moreover, when c. 1607 defines interlocutory judgments as those that decide incidental matters, it does so with the following proviso: "*firmo praescripto* can. 1589 § 1." And that canon indicates that not all incidental matters are decided by a judgment, but that the judge, when admitting it, can choose to resolve the matter by decree that must be reasoned in law pursuant to c. 1617. However, now we note that c. 1618 also offers us something new, that some of those judgments and some of those interlocutory decrees may have the force of a definitive judgment.

II. Thus it is stressed that although all interlocutory judgments and interlocutory decrees are pronounced in the procedural *iter*, nonetheless, at times said pronouncements of the judge, instead of facilitating the progress of the proceedings, which usually will clear the way for its continuation, close the way to the definitive judgment, having a finalizing effect on the litigation in a manner similar to that of the definitive judgment.

That purely formal dimension of the efficacy with respect to the possible conclusion of the process is, in our opinion, what is contemplated in c. 1618 when it gives these incidental judicial resolutions, on some occasions, a *vis sententiae definitivae*. Arroba is right when remarking that the significance of the force of a definitive judgment provided by this canon is "only looking at the procedural effects. Thus an interlocutory decision is believed to have the significance of a definitive judgment when it prevents the continuation of the case, or a stage thereof, even if it is only in connection with one of the parties."[1]

III. These eventualities can occasionally take place occurring, according to the canon: *in the first place*, when the interlocutory judgment or the decree prevents the trial from beginning; *second*, it brings the trial to an end once it has begun; *third*, when it ends an instance that has already

1. M.J. ARROBA CONDE, commentary on c. 1618, in *Código de Derecho Canónico* (Valencia 1993), p. 701.

begun (it should be understood as a second or subsequent instance, because if it is the first instance, it is already contemplated in the circumstance we have indicated as *second*).

1. *The first of the situations indicated* refers, to our understanding, to the *decree that judges must pronounce if they reject "in limine litis" the petition*, according to the situations indicated in c. 1505 § 2. We have already indicated the importance that every judicial decision has for the party when it rejects some request made by said party, and even more relevant is the rejection of the first and fundamental *petitum*, the libellus of the lawsuit. Therefore, this type of judicial resolution must be reasoned (see commentary on c. 1617). The reasons are even more necessary in this case, because c. 1505, with respect to the decree rejecting the petition and thereby preventing the process, authorizes a specific recourse, before the tribunal of appeal, or before the college if this libellus was rejected by the presiding judge of the tribunal. This recourse must be reasoned by the appellant, but the appellant could hardly correctly set forth those reasons in its appeal if it did not know the reasons justifying the decree by which the petition was rejected.

2. In the *second place*, the canon refers to the *interlocutory judgment* or to the *decree bringing an end to the trial.* In contrast to the aforementioned case, we have here some situations that can be resolved judicially in different ways:

a) *By decree*, which must be *explanatory*, in the *cases of expiry of the instance.* We cannot now go into an analysis of expiry of an instance (see commentary on cc. 1520–1523), but we should note that this type of extinction of the process due to the passing of time without any procedural act taking place therein, even if it operates *ipso iure*, must be declared ex officio by the judge even if none of the parties requests said declaration. If this resolution by the judge is merely declaring what *ipso iure* has occurred, nonetheless it is understood in practice that the decree must be pronounced in order to consolidate and formally reveal the extinction. This declaration of the judge is made by an explanatory decree in which the incidence of the time factor and the lack of procedural motivation shall simply be explained.

In this aspect, the *NSRR* of 1994 give better guidance, at the beginning of art. 11 with the following words: "Finita instantia per sententiam vel decretum," although it then continues to regulate matters related to judicial expenses and free representation. Additionally, however, its art. 65 provides that the expiry of the instance is declared by a decree by the *ponens*.

b) In the same context and title in which expiry of the instance is regulated, the *CIC*, cc. 1524 and 1525, contains the provisions related to *the renunciation of the instance*. Canon 1524 § 3 establishes the requirements for the validity of this renunciation, and for it to have the same

efficacy as expiry. Among these requirements, at the end, it indicates, "*debet... a iudice admitti.*" This admission by the judge, which in art. 68 of the *NSRR* is attributed to the *ponens,* must be declared *by an explanatory decree,* which will explain that the requirements of c. 1524 § 3 and those of § 2 were satisfied, if a situation such as that foreseen by this last provision occurred.

In these situations of a renunciation of the instance, the effect of a definitive judgment established in c. 1618 could very possibly occur, there could be extinction of the process *quod attinet ad aliquam saltem partem in causa.* Let us consider, for example, in an active joinder by which a process is initiated. Given the voluntary nature of this legal standing, shared by the plaintiffs, it is lawful for one of them to renounce the instance and for the process to then continue between the other plaintiff (or plaintiffs) and the respondent (or respondents), without prejudice to any consequences that may arise should there really be a need for a joinder due to the indivisibility of the thing requested, or because they are joint obligations (c. 1637 § 2).

Lastly, we believe that it is worth including in this category the decree of presumption of renunciation of the instance that the judge must pronounce in the event of the an *unexcused absence,* or an absence with an excuse that is not justified by the plaintiff, who still fails to appear after the second summons, pursuant to c. 1594, 2°. In this situation, the instance may possibly be maintained by the respondent, regardless of whether it is presumed that the absent plaintiff renounced the instance, giving rise once again to that effect for only one of the parties, as permitted by c. 1618 *in fine.*

c) Another way of extinguishing the instance, without reaching the definitive judgment, is *for the respondent or respondents* to claim as a dilatory exception *the existence of some defect that may result in nullity of the judgment,* according to c. 1459 § 1, but this defect will supposedly affect, with the same nullity, all procedural acts subsequent to the one that was absolutely null as a result thereof. This exception can not only be proposed as a dilatory exception, which would require that it be filed prior to the joinder of issue (c. 1459 § 2), but can be claimed in any phase or stage of the proceedings, or even, *if the judge notices it,* without the need for a claim by a party, he may file it ex officio.

The same can be said *of other dilatory exceptions,* especially *if they refer to the persons and the method of the trial,* that is, to the failure to observe procedural suppositions. These are necessary requirements for juridical or procedural capacity for the parties, in which we can also include the violation of rules regarding the absolute competence of the judge—an exception that may be filed at any stage of the trial (c. 1461). We can include also the election and acceptance by the judge of a procedure insufficient to present the specific claim, for example, violation of the provisions of c. 1690.

Regardless of whether these exception are filed as dilatory exceptions or whether they are proposed after the joinder of issue, with regard to their processing, it will be governed by the rules on incidental matters. However, because of the importance of these causes, they would be those that the judge, when admitting them, would decide to resolve by a judgment. In this case, if the judge does not provide otherwise, its processing will be regulated by the norms of the oral process (c. 1590 § 1). *In this hypothesis, it will be the interlocutory judgment that ends the instance,* if therein the defect of nullity alleged by the party or filed ex officio by the judge is acknowledged or other exceptions alleged with the support of c. 1459 § 2 are sustained.

It will also occur with the so-called mixed exceptions, which by nature are peremptory, but may be proposed as dilatory exceptions. They are contemplated in c. 1462 § 1. They can be proposed and handled before the joinder of issue, in which case *the interlocutory judgment* by which the incident thus presented, if the exception is favorable, *will conclude the instance* without ever reaching the definitive judgment in said process that has already begun. Let us not forget that the instance begins with the summons of the respondent (or respondents) (c. 1517).

If, however, these mixed exceptions are not filed as dilatory exceptions, when filed after the joinder of issue, or if it is the adjudged matter exception and the judge is late in noticing it, inasmuch as he can assess it ex officio (c. 1642 § 2), *the procedure followed by other defenses* alleged by the respondent *will be followed. It will be decided,* either sustaining or denying the exception, *in the definitive judgment.*

3. *Third,* the canon also maintains the *definitive force of an interlocutory decree* when it *ends an instance of the case.* We already indicated that said instance *should be understood as the second or subsequent instance,* if any, inasmuch as the first instance is ended by the interlocutory judgment or the decree ending the case. That is, it corresponds to the second type of extinction described by the canon.

In this third section, we are only referring to the possible instances of the appeal of the definitive judgment, because all those that we describe as extraordinary recourses are still of the first instance when they are formally proposed, even if the means of challenging the definitive judgment are appropriate. This includes the instance resulting from the complaint of nullity exercised separately from the appeal, as well as that of *restitutio in integrum,* and that of *nova proposito* in cases concerning the status of persons. Consequently, it should be understood that interlocutory decrees and judgments pronounced therein, whether they are rejecting the petition *in limine,* and thereby preventing the trial, or they are ending the trial, correspond to what has been analyzed successively in the preceding sections (1 and 2).The decree ending the trial in the instance (meaning the second or subsequent instance), will correspond to what will be stated later in this section, common to all instances under appeal.

In the various stages of the instance characteristic of the appeal, the situations of expiry of the instance can be repeated, due to a lack of activity, and a waiver of the instance as discussed in section 2 above. In that situation, it begins with an appeal filed within the established legal term, and then formalized before the judge or tribunal *ad quem, ad prosequendam appellationem* (c. 1634).

At this stage of the appeal, stagnation of the procedural activity for six months can be considered (c. 1520), as well as the waiver of the appeal by the party that filed it, *in quolibet statu et grado iudicii* the plaintiff can waive the instance, pursuant to c. 1524 § 1. The appellant is the party that actually acts as the plaintiff in the ordinary recourse, because it is the plaintiff's initiative seeking total or partial revocation of the judgment, regardless of whether the plaintiff is a private or public party (c. 1636).

In these cases, if more than one party appealed the definitive judgment, any of the appellants may also waive the appeal. In the decree from the judge accepting said waivers, this will cause the appeal to be maintained by some litigants and the waiver to affect only one of the parties to the cause, as generally authorized by c. 1618 *in fine.*

Expiry and waiver of an instance, when formalized and resolved by decree, can be affected by the provisions of c. 1637 § 2, as we have seen above, with respect to the necessary joinder of issue, regardless of the personal positions adopted by the parties as a result of the challenge of the judgment by the appeal, when it is a matter of an indivisible thing and joint obligations.

It is unlikely that exceptions ending the trial could be filed in the appeal stage, such as those indicated pursuant to cc. 1459 and 1462 § 1. However, at times, in these appeal proceedings defects or objections may possibly arise. This could include objections that can be called exceptions that the judge declares ex officio, such as the unlawful inadequacy of the procedure, procedural capacity defects, or defects of nullity of the mandate of the procurator, or even adjudged matter. We are only citing these as examples.

In all these hypotheses, it seems appropriate for the appeal to resolve these exceptions by the definitive judgment that the judge or tribunal of the respective instance must pronounce when appropriate. This is in spite of the fact that c. 1459 § 1 allows it to be proposed at any stage of the case, and its § 2 also authorizes some late filing of those that took place late, and, for absolute incompetence, the text of c. 1461 is conclusive.

It cannot be forgotten that the effects of expiry and of renunciation of the appeal are not exactly those of cc. 1522 and 1525, respectively, inasmuch as its main effect is that of adjudged matter that the judgment would reach, subject to appeal up to that point (c. 1641, 3°). On the other hand, alleging exceptions such as those of cc. 1459 and 1462 in a second or subsequent instance would necessarily result in the issuance of pronouncements that must affect the same definitions formulated by the appealed

judgment. This appeal would lose its value on many occasions if any of the aforementioned exceptions is sustained. This would mean starting to resolve the same principal cause already resolved, and this role can never be performed by interlocutory decree or judgment.It would be the task of the definitive judgment that must be pronounced by the higher court in the appeal.

IV. There are already many questions regarding this c. 1618. But we can refer to the following two in order to conclude the exegesis of the canon:

1. *First, there is the issue of the appeal of these interlocutory judgments and decrees that end the instance and the trial.*

In this discussion, we are excluding the decree that prevents the trial, because this decree has a specific recourse, which is regulated by c. 1505 §§ 3 and 4. Thus, we are referring *to those that declare expiry* in any stage in which they occur, and to *interlocutory judgments and decrees that decide the end of the instance as a consequence of the filing of dilatory and mixed exceptions*, whether they are filed before or after the joinder of issue, in accordance with law, or discovered ex officio by the competent judge or tribunal in the incidental cause.

In our opinion, said *interlocutory decrees and judgments are appealable*, pursuant to c. 1629, 4°, which only excludes from the appeal of interlocutory judgments and decrees *quae non habeant vim sententiae definitivae*. Given that these judgments and decrees have that force, according to c. 1618, it must be concluded that they are appealable.

However, the well-known writer Della Rocca has maintained that, by virtue of the general revocability of interlocutory judicial resolutions, which is authorized for the judge or tribunal of the principal matter for just cause after a hearing of the parties, said resolutions are also revocable before the case ends, when "they have the force of a definitive judgment." That definitive force, he adds, would depend on how the pronouncement "is limited to resolving the incident, leaving intact the positions and proceedings of the principal matter, or it changes them such that it practically excludes the definitive judgment. (This is the case with all interlocutory pronouncements that, for example, declare the nonexistence of procedural situations or the existence of a defect of constitution in the process, or also that of expiry)."[2] But these latter pronouncements, we believe, are still appealable according to c. 1629, 4°.

In our opinion, the provisions of c. 1591 are limited by the provisions of c. 1629, 4° *contrario sensu*. The revocability of interlocutory judgments and decrees basically depends on the fact that they are not subject or to appeal pursuant to c. 1629,4°. Therefore, when, as an exception, they are

2. F. Della Rocca, *Instituciones de Derecho procesal canónico* (Buenos Aires 1950), p. 304.

appealable because *habent vim sententiae definitivae*, said judicial resolutions are exempt from that general revocability authorized by c. 1591.

We know the common opinion held by canonical doctrine and even jurisprudence on the general revocability of interlocutory resolutions. The limit on that revocability we are proposing is still in legal texts in which we find it, but we are not only postulating it for the interlocutory judgments and decrees of c. 1618. We believe that wherever there is a definitive effect, as a consequence of an interlocutory resolution, creating fair expectations for the favored party, in the specific case, some rights are created for this party that will determine in some way the definitive judgment. Therefore, if the party prejudiced by the interlocutory decision does not appeal it during the procedural *iter*, within the term established by law, that party will only be able to have recourse against said decision, which has prejudicial effects, by incorporating its challenge into the appeal against the definitive judgment, as if it were already an interlocutory judgment that was not autonomously appealable (1629, 4°).

In our opinion, it is worth reconsidering a provision such as the one in *PrM* 214 in two instances. The first is when expressly authorizing the appeal of interlocutory judgments and decrees when they had the force of a definitive judgment, and, second, when it defines what is meant by definitive force (it does not say "force of definitive judgment"): *quum gravamen inferant quod non potest per definitivam sententiam reparari*. And it cites as an example the denial of evidence when it can influence the definitive judgment to be pronounced at the appropriate time. I believe that effects such as those indicated herein should not be left up to the discretion of potential revocability of the interlocutory decision of the judge, but deserve to be guaranteed by law with the juridical power, granted to the supposedly prejudiced party, to exercise an *ius appellandi*.

Lastly, c. 1591 also favors the appealability of judgments and decrees that end the trial, in that it authorizes the judge or tribunal to revoke the interlocutory resolution *antequam finiatur causa principalis*. When the interlocutory judgment or decree ends the main cause by extinguishing that instance, the party thereafter has no more procedural resources than the ability to appeal the interlocutory judgment or decree that ended the instance.

2. *A second issue* with respect to the text of c. 1618 is: the interlocutory judgment or decree *vim habent sententiae definitivae*. We nonetheless believe that the *definitive judgment does not in itself have any force*. The definitive judgment must only answer each of the matters raised in the principal case (c. 1607). *This force* that the canon mentions *is none other than that which is derived from its firmness*, that is, *when it has the effect of an adjudged matter* in accordance with the situations of c. 1641. This effect of firmness for the definitive judgment to acquire force, (effectiveness), and to be obtained by the law between the parties, originate the *actio iudicati* and make way for the *rei iudicatae* exception,

only occurs in the definitive judgment that cannot be directly challenged (c. 1642). We even believe that it occurs thus with the definitive judgments on the status of persons (see especially the commentary on cc. 1643 and 1644).

Perhaps the canon, instead of stating that these judgments or decrees, which prevent or end the trial and the instance, have the force of definitive judgments, *should state that they operate in the manner of definitive judgments*. In fact, as shown by Della Rocca, the judgment is definitive not only when it is pronounced on the merits of the case, but also "when in view of contempt by the plaintiff, the judge absolves the respondent from complying with the trial ... or even when it declares absolute incompetence of the judge, both cases in which the action remains intact and the adjudged matter does not take place;"[3] in the same way that absolving judgments that "usually occur when the action has not been brought or pursued regularly, or even when the plaintiff has abandoned it, are also definitive judgments."[4]

3. F. DELLA ROCCA, *Instituciones...*, cit., p. 305
4. Ibid., p. 307.

TITULUS VIII
De impugnatione sententiae

TITLE VIII
Challenging the Judgement

INTRODUCTION

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1. *General outline of the challenge*

The new procedural norms have abandoned the traditional term "remedy" (*remedium*) against the judgment (cf. book IV, part I, sec. I, tit. XIV *CIC*/1917), taken from Roman law (cf. D. 12, 6, 23, 1; C. 2, 9, 3; C. 7, 50, 2) and from common law, and have replaced it with the term "challenge" (*impugnatio*), originating from modern procedural systems, especially from the Roman systems. The term "challenge" does not have any corresponding term in the language of common law. And as for the rest, where it has been used, it has not quite acquired a specific meaning that is autonomous, or rather, independent of the specific denomination of the various means of challenge.

The change made in this regard, which was already indicated during the revision of the procedural norms, was justified by a desire to get rid of a term erroneously believed to have a medicinal flavor: "*remedium = medicamentum*," and thus inappropriate in the definition of procedural appeals. Therefore, the more developed terminology of modern procedural systems was employed.[1]

The new term "*impugnatio*" (challenge) was preferred, in spite of the fact that the verb "*impugnare*" (to challenge), originating from the fight concept ("*pugna*" = fight, battle), etymologically means, "to combat, contradict, refute." Consequently, the principle of challenge could seem to be favored in detriment to the values of charity, justice, and communion, which can never be disregarded, but rather promoted and revalued, in the canonical process.[2]

1. Cf. *Comm.* 2 (1970), p. 187; 8 (1976), p. 190.
2. Cf. *Comm.* 11 (1979), p. 144.

But there is another reason why the new term has been welcomed in the field of canon law. One expert has promoted this term stressing "the public and fundamental character of the so-called jurisdictional guarantees of the person," who has not only the right to appeal, but also rights with respect to the administration of justice in the ecclesial sphere. In this regard, a challenge to a judgment constitutes a type of "constitutional control" and an important step in the path begun with the vindication of rights in the competent canonical forum (c. 221 § 1).[3]

Canonical procedural legislation does not offer any general norm for the new concept of challenging a judgment, presented in the heading of tit. VIII, which precedes the discussion of the various means of challenging. Therefore, the general presentation of the challenge, its description, it basic procedural profile, and the classification of the means of challenging, must be taken from all the norms regulating the various means of challenging as well as the canonical tradition that gave rise to the formation of remedies or claims against judgments and its systematization (c. 6 § 2).

With the introduction of the term "*impugnatio*" in the field of canonical procedural law, a question arises that has already been widely discussed in civil procedural doctrine, which has resulted in a wide range of opinions and points of view with regard to the meaning that must be attributed to the concept of a challenge, as well as to that of "burden," and consequently, to the respective means of challenging (complaint of nullity, *restitutio in integrum* and *nova causae propositio*) andof judging in the appeal the specific "burden" justifying this institution.

In fact, a canonical judicial judgment can also be considered a juridical act (the declaration), similar to other juridically structured acts (cf. c. 124 § 1), although procedural norms define in a special way its substantial structure (c. 1612) as well as all the required essential elements "*ad validitatem actus*" (cc. 1620, 1622).

Therefore the "*vitia in procedendo*" due to a violation of procedural laws, which affect causes of nullity of the judgment, give rise to the challenge action called "*querela nullitatis*" (cc. 1619–1627), which also applies against the other juridical acts affected by nullity (c. 1460 § 2), although it is then called "*actio nullitatis*" (cf. c. 1679 *CIC*/1917). This challenge is based on the specific defect of nullity and tends to eliminate a juridically null judgment.

The same judgment, however, because of its content, can be also considered a proceeding that is manifested through the decision on the dispute between the parties (c. 1611). In this regard, the judgment can

3. J.M. SERRANO RUIZ, "La querela di nullità contro la sentenza (commentary on cc. 1619–1627)," in *Il processo matrimoniale canonico*, 2nd ed. (Vatican City 1994), p. 751. Cf. F. DELLA ROCCA, "I mezzi d'impugnazione," in ibid., p. 735; K. LÜDICKE, "Zum Berufungssystem im kirchlichen Ehenichtigkeitsprozess," in *Justus Iudex* (Essen 1990), p. 510.

acquire a tone of injustice, inherent to the decision, because of the "*vitia in iudicando,*" in law and in fact, that are manifested, either in an erroneous juridical evaluation of the facts in dispute or in an erroneous application of the law to the facts ("*error iuris*"), or in the erroneous establishment of the facts themselves, because it does not conform to the truth ("*error facti*"), such that the procedural truth does not correspond to the substantial truth.

Removal of injustice cannot take place through a challenge of formal defects, but only through the appeal (c. 1628). In fact, the appeal, more effectively seeking to go against the injustice, reopens the possibility of examining the main issue of the case and of overcoming the cause of prejudice through a new trial and the substitution of the judgment of the judge under appeal by the appellate judge (cf. c. 1639 § 1).

When considering the element of injustice in the judgment, which constitutes the object of the appeal, it is also necessary to distinguish between the concept of "prejudiced party," that while it subjectifies the element of injustice, also tends to be objectified or outwardly manifested[4] and to exceed even the limits of the juridical-procedural relationship. In this way, it also becomes an instrument of defense of the ecclesial public good, which is the "*salus animarum.*" In this way, the right to appeal, taking into account the principle of "*duplex conformis*" (cc. 1641, 1°, 1684 § 1), also devolves upon the prejudiced party, together with the promoter of justice and the defender of the bond, provided that they intervene in the case or their presence is required by law (cc. 1626 § 1, 1628).

Although the concept of "burden" is deeply rooted in canonical tradition,[5] the unitary generic concept of "*impugnatio sententiae*" appears in the new procedural law as a procedural remedy for judicial judgments. In this way, the challenge also absorbs the "burden" (which is the basis for the appeal), and, therefore, is intended to remove not only the procedural defects of the judgment, but also the substantive defects, through the specific means of challenge established by law.

Inasmuch as the challenge concept implicitly includes the condition of being prejudiced by the judgment, given that the injustice prejudices the losing party, some believe that the condition of being the losing party includes the interest in challenging the judicial decision. However, it has been rightly stressed that there is a subjective procedural right to challenge, which must be categorized a new as the losing party's right to act in order to have the challenged judgment changed. In this way, in addition to the procedural legitimization, that is, "*ad causam,*" it also maintains the

4. F. DELLA ROCCA, *Appunti sul processo canonico* (Milan 1962), pp. 141–142.
5. Cf. *X* II, 28, 38; *VI* II, 15, 1; *Clem.* II, 15, 5; *Extrav. com.* I, 9, 1; CONC. TRID., *Sess.* XIII *De ref.*, c. 1; *Sess.* XXIV *De ref*, c. 20; BENEDICT XIV, Const. *Ad militantis*, March 30, 1742, § 3, in *CIC Fontes*, I (Rome 1923), no. 326, p. 731; *PrM* 214 § 2; NTRR, art. 105.

need for an interest in the challenge, due to the prejudice suffered because of the pronouncement of the judgment (cc. 1626 § 1, 1628).

However, this requirement can undergo a reduction when the promoter of justice and the defender of the bond exercise the power to challenge in the public interest (cf. cc. 1626 § 1, 1628).

2. *Foundation and classification of challenges*

The legal basis of the challenge is the judgment subject to challenge, when it is marred by injustice, due to the absorption of the burden by the appeal in current procedural norms, as well as when it is affected only by nullity.

Taking into account the principle of the precedence of substance over form, which also operates in canonical procedural norms, the definitive judgment is susceptible to challenge (c. 1607), as well as, according to constant canonical tradition,[6] any other jurisdictional order, such as the interlocutory judgment or the decree (cc. 1607, 1589 § 1, 1617), provided that it has the force of a definitive judgment (cc. 1618, 1629, 4°). In fact, that is the essential condition for challenging, namely, the substantial decision of the order, which, when deciding the rights of the parties, precludes subsequent handling of the case in the same instance of the trial (c. 1618).

In doctrinal speculation, there is a discussion of the nature of the judgment subject to challenge, and specifically whether it is really a judgment, if it is only "a juridical situation," or "an element," that, together with other elements, can become a judgment, or if it is a judgment, subject to suspension or resolution. However, that judgment, as a jurisdictional act, should be considered a real judgment, with its efficacy established by law and binding on the claims of the parties. In fact, that judgment closes the process at the instance in which it was pronounced, prevents new litispendence at that instance, and determines the object of the trial for the higher instance (c. 1639 § 1).

The unity of the concept of challenge does not prevent canon law from strictly establishing the various means of challenges regulating their function, their discipline, and the procedures characteristic of each one thereof.

As specific means of challenging the definitive judgment established by law, in addition to correcting material errors (c. 1616), which is not a challenge in the strict sense, the plaint of nullity (cc. 1619–1627) and the appeal (cc. 1628–1640) can be lodged, while opposition by a third party (cf. cc. 1898–1901 *CIC*/1917)[7] has been deleted from current legislation.

6. Cf. CONC. TRID., *Sess.* XXIV *De ref*, c. 20; c. 1880,6° *CIC*/1917; *PrM* 214 § 1.
7. *Comm.* 11 (1979), p. 161.

"*Restitutio in integrum*" (cc. 1645–1648), however, is provided for a judgment that has become an adjudged matter, and lastly, for two conforming judgments in causes on the status of persons, the "*provocatio*" or recourse for obtaining a new presentation of the case (c. 1644) is granted.

Inasmuch as there is a difference between the various challenges allowed by law, doctrine suggests varying classifications for the means of challenging, which are based on the various situations and their means of operation.

In the field of canonical procedures, the following different types of challenges can be found: *a*) returnable challenges, which submit the entire cause to the judge of a higher court (cf. cc. 1625, 1628, 1633–1634, 1639, 1644 § 1, 1646 § 2), and non-returnable challenges, which submit the matter to the same judge of the challenged judgment (c. 1621, 1624, 1646 § 1); *b*) suspensive challenges, which suspend execution of the challenged judgment (c. 1638; cf. c. 1647 § 1) and non-suspensive challenges, when the law does not attribute that effect to them (c. 1644 § 2); *c*) substitutive challenges, which lead to a new decision of the judge "*ad quem*" that will replace the challenged judgment (c. 1640); *d*) rescissory challenges, that tend towards a trial on the judgment challenged due to the alleged defect and can either be exhausted in the "*iudicium rescindens*" (c. 1624) or go into the substantive matter, substituting the "*iudicium rescissorium*" for the challenged judgment for (c. 1648); *e*) ordinary challenges, that are based on the unlimited scope of the burden preventing adjudged matter from taking place (c. 1628), and extraordinary challenges, which entail the restrictive nature of the reasons (cc. 1620, 1622, 1645) and can be also lodged against the judgment that has become an adjudged matter (cc. 1621, 1645–1646) or against the "*duplex conformis*" in status causes (c. 1644 § 1).

Lastly, law allows a combination of challenges, that is either optional, such as, for example, the appeal proposed with the plaint of nullity (c. 1625), or mandatory, such as the autonomous appeal against the definitive judgment accumulated with the subordinate appeal against an act that does not have the force of a definitive judgment (c. 1629, 4°).

CAPUT I
De querela nullitatis contra sententiam

CHAPTER I
The Plaint of Nullity of the Judgement

1619 **Firmis cann. 1622 et 1623, nullitates actuum, positivo iure statutae, quae, cum essent notae parti querelam proponenti, non sint ante sententiam iudici denuntiatae, per ipsam sententiam sanantur, quoties agitur de causa ad privatorum bonum attinenti.**

Without prejudice to cann. 1622 and 1623, whenever a case concerns the good of private individuals, acts which are null with a nullity established by positive law are validated by the judgement itself, if the nullity was known to the party making the plaint and was not raised with the judge before the judgement.

SOURCES: *SNAS* 103; CPAC Rescr., 28 apr. 1970, 22

CROSS REFERENCES: cc. 1622,5°, 1626 § 2

COMMENTARY

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Although the location of this norm may cause some confusion from a systematic point of view, inasmuch as it refers to the possibility of proposing the "*actio ob nullitatem actorum*" (cf. cc. 1679–1683 *CIC*/1917), the connection of this canon, described as "*novus*,"[1] with the plaint of nullity against the judgment cannot be denied. In fact, its origin and successive development[2] show that the norm seeks to prevent, or at least limit, resulting nullities, correcting them through the judgment, provided that the conditions established by law are met. The mechanism for correcting nullity of acts is not new. It was already maintained by at least one sector of

1. *Comm.* 11 (1979), p. 144.
2. Cf. *Comm.* 2 (1970), p. 186; 8 (1976), p. 190; 15 (1984), p. 69.

canonical doctrine during the *CIC*/1917 period and was also tried in a matrimonial procedure granted to the Bishops' Conference of the United States of America on April 28, 1970, where it was included in norm XXII, which specifically discussed the plaint of nullity against the judgment,[3] and therefore had a location similar to that found in the *CIC*.

The judgment exercises its corrective efficacy only when certain specific requirements are met, which are strictly provided by law, with respect to the plaintiff as well as the null procedural acts.

Thus, it is required that the nullity of the acts, expressly provided by law (c. 10), come from positive law (cf. cc. 1433, 1437 § 1, 1511, 1598 § 1, 1617) and therefore not from natural law. It must also be known by the plaintiff in the course of the proceedings, but not raised with the judge before judgment is pronounced. And lastly, it must refer only to causes concerning the private good.

Although the formulation of the norm does not raise any particular difficulties in interpretation, nonetheless there has been an attempt to extend the scope of the corrective efficacy of the judgment also to null acts in causes concerning the public good. Although substantial reasons should not hinder acceptance of this opinion, it nonetheless contradicts a strict interpretation of the text of the norm. In fact, the juridical meaning of the text of the section, which restricts the corrective efficacy only to causes related "*ad bonum privatum*," is so clear that it does not allow this first hermeneutic criterion (c. 17) to be ignored in favor of a broad interpretation. This is even more true if one bears in mind that the phrase we are discussing was intentionally added in the course of the drafting of this norm, precisely to restrict the scope of the corrective efficacy only for cases in the private interest.[4]

The corrective efficacy of the nullity of acts, however, cannot be limited only to judgments that have become adjudged matters and are, therefore, executory (c. 1650 § 1), because the norm refers to all judicial judgments, definitive as well as interlocutory (c. 1607), pronounced in an incidental cause according to the norms of the ordinary process (c. 1590 § 1).[5]

Lastly, this canon does not seem to extend the scope of nullities resulting from the judgment. In fact, these nullities, in cases concerning the public good, are subsumed in the situation described in c. 1622, 5°, while in cases concerning the private good, pursuant to said canon, they have an annulling effect on the judgment only if any of the requirements for corrective efficacy are not met.

3. Cf. C. LEFEBVRE, "De procedura in causis matrimonialibus concessa Conferentiae Episcopali U.S.A.," in *Periodica* 69 (1970), pp. 587–588; O. ROBLEDA, "De nullitate sententiae iudicialis. Retractatur ius circa querelam contra sententiam," in *Periodica* 63 (1974), p. 7.

4. *Comm.* 15 (1984), p. 69.

5. Cf. NTRR 75.

1620 Sententia vitio insanabilis nullitatis laborat, si:
1° lata est a iudice absolute incompetenti;
2° lata est ab eo, qui careat potestate iudicandi in tribunali in quo causa definita est;
3° iudex vi vel metu gravi coactus sententiam tulit;
4° iudicium factum est sine iudiciali petitione, de qua in can. 1501, vel non institutum fuit adversus aliquam partem conventam;
5° lata est inter partes, quarum altera saltem non habeat personam standi in iudicio;
6° nomine alterius quis egit sine legitimo mandato;
7° ius defensionis alterutri parti denegatum fuit;
8° controversia ne ex parte quidem definita est.

A judgement is null with an irremediable nullity, if:
1° it was given by a judge who was absolutely non-competent;
2° it was given by a person who has no power to judge in the tribunal in which the case was decided;
3° the judge was compelled by force or grave fear to deliver judgement;
4° the trial took place without the judicial plea mentioned in can. 1501, or was not brought against some party as respondent;
5° it was given between parties of whom at least one has no right to stand before the court;
6° someone acted in another's name without a lawful mandate;
7° the right of defence was denied to one or other party;
8° the controversy has not been even partially decided.

SOURCES: 1°: c. 1892,1°; *PrM* 207,1°
3°: CPAC Rescr., 28 apr. 1970, 22 § 3
4°: CPAC Rescr., 28 apr. 1970, 22 § 1
5°: c. 1892,2°; *PrM* 207,2°; CodCom Resp., 4 ian. 1946 (*AAS* 38 [1946] 162)
6°: c. 1892,3°; *PrM* 207,3°
7°: CPAC Rescr. 28 apr. 1970, 22 § 2; Signatura Litt. 30 dec. 1971, III, 8; Signatura Litt. circ. 24 iul. 1972, 5, c et d
8°: *SNAS* 122 § 1; CPAC Rescr., 28 apr. 1970, 22 § 4

CROSS REFERENCES: 1°: cc. 1406 § 2, 1440, 1461
2°: cc. 1422, 1423
3°: cc. 125, 172 § 1, 1°, 188, 643 § 1, 4°, 656, 4°, 1103, 1191 § 3, 1200 § 2, 1323, 4°, 1360, 1538
4°: cc. 1501, 1502, 1507 § 1, 1592 § 1, 1658, 1659, 1677 § 1, 1709 § 1, 1721 § 1, 1723 § 1

5°: cc. 1478, 1505 § 1 § 2, 2°
6°: cc. 1484, 1485, 1524 § 3
7°: cc. 221 § 1, 697, 2°, 1598 § 1, 1601, 1602, 1603 § 1, 1606, 1725
8°: c. 1611, 1°

COMMENTARY

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The procedural norms on defects of nullity of the judgment at present follow the traditional distinction between remediable and irremediable nullity, explicitly corroborated by the previous legislation (cc. 1892, 1894 *CIC*/1917), based on practical criteria[1] that include, the objectively relevant and radical defects, dealing with the essence, either of the reasons for the judgment or its constitutive elements, and therefore not subject to remedy through the passing of time. These criteria also include, however, defects dealing with the formality of the presuppositions or of the structure of the judgment, which are therefore essentially remediable. In fact, these defects, by virtue of the preservation of procedural acts, are subject to remedy, if their nullity is not claimed, by the mere passing of the time periods established for the plaint of nullity (cf. cc. 1626 § 2, 1623).

The distinction does not appear to be owing to the fact that reasons for irremediable nullity are related to the public good and the reasons for remediable nullity, to the private good, which the parties may even waive. Rather it is based on the intrinsic gravity of those reasons and on the diversity of the time periods established by law for their challenge. In fact, remediable nullity can also be revealed ex officio by the judge, and therefore is not only available to the parties (cf. cc. 1626 § 2, 1459 § 1).

Within the scope of irremediable nullity, there is usually a distinction between defects or faults producing that nullity by virtue of natural law,[2] that is, "*ex natura sua*,"[3] because in these cases one must speak of the non-existence of the judgment rather than its nullity or juridical inefficacy (cf. c. 1620,4°, 7°, 8°); and other defects that cause irremediable nullity of the judgment by virtue of positive law (cf. c. 1620, 1°–3°, 5°–6°). All of them, moreover, can cause original or derived nullity.

Analyzing the requirements for the existence of a judgment, especially when the distinction thereof is postulated by natural law, as was

1. *Comm.* 11 (1979), p. 145.
2. *Comm.* 2 (1970), p. 186.
3. *Comm.* 8 (1976), p. 190.

considered while the previous legislation was in force, and prevailing doctrine and jurisprudence also admitted other reasons for nullity of the judgment not enumerated in c. 1892 of the *CIC*/1917. Dispensing with the lively debate on whether or not said reasons are restricted with regard to their challenge through the plaint of nullity, under new legislation there is also the opinion that the enumeration of the defects of remediable nullity of the judgment in c. 1620 is not complete, that is, exclusive.[4]

However, it should be indicated that in the reality of procedural phenomena, some of the reasons for nullity mentioned in c. 1620 find almost no easy practical application, such as those referring to the presuppositions for the judgment.

The canonical norm, however, by stressing the will of the judge (formal cause of the judgment), who, when settling the dispute must be free from force or grave fear (c. 1620, 3°), does not provide any invalidating effect for simulation, (that is, for a voluntary divergence between the internal will of the judge and his external declaration of the pronouncement), or even for his inability to understand or form an intent in the act of deciding, or even for an error related to the substance of the act (c. 126), etc. They are certainly essential requirements "*ex natura rei*" that, nonetheless, will not have practical relevance in the development of the process. Thus, one can speak of the practical sufficiency of the reasons for remediable nullity of the judgment in connection with its challenge through the plaint of nullity.

Now let us consider the reasons enumerated by the canon.

1. *Absolute incompetence of the judge*

The unrepealability of the norms on absolute incompetence removes from the ordinary judge judicial power over given cases according to the dignity of the persons and according to the subject (cc. 1405, 1406 § 2), the grade of the tribunals (c. 1440)[5] and their function (c. 1447), especially with respect to challenges of judgments (cc. 1621, 1624, 1628, 1639 § 1, 1644 § 1, 1646) and by reason of the exclusion of some of them that must be handled in a specific process, such as the oral process (c. 1669; cf.

4. Cf. F. ROBERTI, *De Processibus*, II (Rome 1926), pp. 228ff; F. DELLA ROCCA, *La nullità della sentenza nel diritto canonico* (Rome 1939), pp. 163ff; E. GHIDOTTI, *La nullità della sentenza giudiziale nel diritto canonico* (Milan 1965), pp. 103ff; O. ROBLEDA, "De nullitate sententiae iudicialis. Retractatur ius circa querelam contra sententiam," in *Periodica* 63 (1974), pp. 4ff; J.L. ACEBAL LUJÁN, "Nulidad de actos y nulidad de sentencia," in *Curso de derecho matrimonial y procesal canónico para profesionales del foro* (Salamanca 1982), pp. 280ff; J.J. GARCÍA FAÍLDE, *Nuevo derecho procesal canónico*, 2nd ed. (Salamanca 1992), p. 236; G. ERLEBACH, *La nullità della sentenza giudiziale "ob ius defensionis denegatum" nella giurisprudenza rotale*, (Vatican City 1991), p. 175.

5. Cf. SIGNATURA, *Declaratio ire*, June 3, 1989, in *AAS* 81 (1989), pp. 988–990.

cc. 1690, 1710, 1718 § 1,3°), and by reason of the connection or the prevention (cc. 1414–1415, 1632 § 2).

Absolute incompetence implies that judges have the power to judge cases "*in actu primo*," although their absolute limits make their judicial power ineffective with respect to certain cases. But it is a nullity from positive law that was extended to include the reasons for remediable nullity of the judgment.[6]

2. *Absence of the power to judge*

The situation of irremediable nullity contemplated in no. 2° seems to refer to two factual situations. The first can include persons performing a judicial office in the tribunal that has pronounced judgment, but without the power of jurisdiction to judge cases, such as for example the defender of the bond, the promoter of justice or even the auditor exclusively designated to instruct cases (c. 1428 § 3), or a judge competent in another court.The second can refer to any private person that "*in actu primo*" is lacking any jurisdiction. In that case, even more evidently, there is no judge as a public person and as an effective cause of the judgment, which is therefore nonexistent in both cases (cf. c. 1406 § 1).

3. *Violence or grave fear*

Although nullity of a juridical act can be caused by force imposed from outside on a person who was unable to resist (c. 125 § 1) and not by grave fear unjustly inferred, which would only make it rescindable (c. 125 § 2), and irremediable nullity of the judgment can also be caused by grave and not necessarily unjust fear.[7] The relevance of the "*metus gravis*," among the reasons for irremediable nullity of the judgment, has its justification in the extremely grave danger for the ecclesial public order that would be present if the freedom of the judges in the exercise of their function were exposed without protection to grave pressure from the parties or from third parties, and if the invalidating juridical effect of every judicial pronouncement made under grave threat were not provided for said situations. In fact, through the authoritative pronouncement that is binding on the parties, the concrete will of the judge is manifested, which produces the effects of the trial and is described as the formal cause of the judgment, the extrinsic freedom of which is, in this way, protected by the canonical judicial provisions. This is also postulated by the personal dignity of judges, who must enjoy full freedom in the performance of the administration of justice when deciding any judicial dispute for the good of the

6. *Comm.* 11 (1979), p. 146.
7. Ibid., p. 145.

souls of the faithful who turn to the ecclesiastical courts to obtain a just solution to their cause.

4. *Judgment without issue of the party or without contradictory judgment*

The juridical existence of the judgment which resolves the dispute between the parties and presupposes the involvement of these parties in the process, because they constitute the essential presupposition for the judgment and, in scholastic terms, its remote formal cause.The active one of the parties has the procedural initiative, that is, the power to bring the action, which is exercised through the judicial plea (c. 1501), and which must be presented to the competent judge against the other passive party or respondent (c. 1502). Consequently, each of the parties assumes its own position in the process, with the respective procedural powers and responsibilities.

Therefore, with neither the respondent nor the judicial plea of the plaintiff, there cannot be a valid judgment, inasmuch as the judgment must be pronounced on the object of the petition and within the limits marked thereby, pursuant to the principle "*sententia debet esse conformis libello*" (cf. *X* V, 1, 24; V, 3, 31). However, the objective limits of the "*libellus*," according to constant and common jurisprudence, must be understood in connection not only with the "*petitum*" of the petition, but also with the "*causa petendi.*" Therefore, the irremediable nullity of the judgment may come from the "*ultra petita*" or "*extra petita*" pronouncement as well as from that which occurs "*extra causam petendi.*"[8]

5. *Incapacity to act in the judgment of one of the parties*

Legal capacity or standing for the process, which in traditional canonical terminology is expressed with the words "*legitima persona standi in iudicio,*" does not constitute a presupposition for the judgment, but rather the essential quality of the parties to the matter, required for validity of the process and of the judgment.

That lack of capacity, due to age or mental condition (cf. c. 1478), must be filled by a legitimately constituted curator (c. 1479), who assumes representation of the party to the matter.

For these purposes, it is considered that the lack of legal capacity can be absolute or relative, depending on whether the subject has the use

8. Cf. c. DAVINO, April 1, 1976, in *SRR Dec* 68 (1976), p. 161, no. 2; c. DI FELICE, November 12, 1977, in *SRR Dec* 69 (1977), p. 452, no. 3; A. STANKIEWICZ, "De nullitate sententiae 'ultra petita' prolatae," in *Periodica* 70 (1981), pp. 222ff.

of reason (c. 1478 § 1). Absolute capacity must operate by virtue of natural law. Relative capacity, on the other hand, operates by virtue of positive law. Therefore, in the judicial assessment of nullity of the judgment claimed for that reason, not only the existence, but also the gravity of the mental illness causing incapacity must be taken into account, because mentally-disturbed persons may appear in a trial even without a curator, by mandate of the judge (c. 1478 § 4).

6. *Absence of lawful mandate in the procurator*

Irremediable nullity of the judgment, from positive law, is derived from the absence of an authentic mandate (c. 1484 § 1) or from the existence of an invalid mandate. The mandate can be invalid because of a lack of one of its essential elements (cf. c. 1659 § 1 *CIC*/1917), or when it is granted by a party lacking legal capacity, in which case the mandate must be granted by the curator.

In order to validly act before the Roman Rota, the mandate must include explicit mention of the Rota (NTRR 53 § 1).

The designation of the procurator ex officio has the same value as the mandate "*ad litem*" (NTRR 53 § 2, 118).

7. *Denial of the right to defense*

Denial of the right to defense as a reason for irremediable nullity of the judgment was not expressly contemplated in the preceding legislation, although it was not disregarded thereby. Modern sensitivity to human rights and the invocation of canonical tradition caused a resurgence of the "*ius defensionis denegatum*," in doctrine and in jurisprudence, given as a reason for irremediable nullity of the judgment, of recognized origin in natural law (cf. *Clem.* II, 11, 2), which was immediately included in the "Procedural Norms" (XXII, 2) for matrimonial cases and in draft norms for the ordinary contentious trial.[9]

9. *Comm.* 11 (1979), p. 145. Cf. F. ROBERTI, *De processibus*, II..., cit., p. 230; O. ROBLEDA, *De nullitate sententiae iudicialis*..., cit., pp. 19ff; K.T. GERINGER, *Das Recht auf Verteidigung im kanonischen Prozess* (Vienna 1976), pp. 22ff; S. VILLEGGIANTE, *Il diritto di difesa delle parti nel processo matrimoniale canonico* (Rome 1984), pp. 11ff; F. DANEELS, "De iure defensionis. Brevis commentarius ad Allocutionem Summi Pontificis diei 26 ianuarii 1989 ad Rotam Romanam," in *Periodica* 79 (1990), pp. 247ff; G. ERLEBACH, *La nullità della sentenza*..., cit., pp. 119ff. Cf. also c. MANNUCCI, February 27, 1930, in *SRR Dec* 22 (1930), p. 120, no. 4; c. ANNÉ, November 8, 1963, in *SRR Dec* 55 (1963), pp. 755–756, no. 3; c. BEJAN, July 29, 1967, in *SRR Dec* 59 (1967), p. 655, no. 3; c. PARISELLA, July 3, 1980, in *SRR Dec* 72 (1980), pp. 462–463, nos. 3–4; c. POMPEDDA, July 23, 1986, in *SRR Dec* 78 (1986), p. 480, nos. 7–8.

The right to defense, according to established jurisprudence, must be guaranteed to the parties in connection with its intactness (c. 1598 § 1), as well as with the ability to exercise it in the course of the canonical proceedings. This subjective legal right may particularly be manifested in the right of the party to be informed of the procedural initiatives taken by the other party in opposition, and in the right to a judicial hearing. But this is not only the right to be informed or to a passive hearing, that is, to know the content of the judicial petition and of the evidence of the other party, but also the right to active confrontation through the presentation of one's own defense and evidence.

The right to a defense of each of the parties in the trial, as noted by John Paul II, "must be exercised, obviously, according to the just provisions of positive law, the function of which is, not to hinder the exercise of the right to a defense, but to regulate it such that it cannot degenerate into abuse and obstructionism, and at the same time to guarantee the concrete ability to exercise it."[10] In other words, this right must be protected according to procedural norms applied with canonical equity, in order that a rigid protectionism does not make its exercise degenerate into easy abuse, prejudicing the effective administration of ecclesial justice.

Within the framework of this case of irremediable nullity of the judgment due to denial of the right to defense of the private good, it is possible to conceive, as already occurred when the previous legislation was in force, of a similar "*denegatio defensionis*" of the public good. This could occur because of the exclusion from the process of the defender of the bond or of the promoter of justice, when law requires their participation (c. 1433).

8. *Sentence that does not even partially resolve the controversy*

This reason for irremediable nullity, which was already foreseen in the drafts of the new norm,[11] strictly speaking, causes the non-existence of the judgment, to the extent that its formal cause is missing, that is, the authoritative decision of the judge with respect to the right in dispute. In this case, the dispute between the parties is not resolved by the judge.

10. JOHN PAUL II, *Allocuzione alla Rota Romana,* January 26, 1989, in *AAS* 81 (1989), p. 923.
11. *Comm.* 2 (1970), p. 186; 8 (1976), p. 190; 11 (1979), p. 145.

1621 Querela nullitatis, de qua in can. 1620, proponi potest per modum exceptionis in perpetuum, per modum vero actionis coram iudice qui sententiam tulit intra decem annos a die publicationis sententiae.

In respect of the nullity mentioned in can. 1620, a plaint of nullity can be made in perpetuity by means of an exception, or within ten years of the date of publication of the judgement by means of an action before the judge who delivered the judgement.

SOURCES: c. 1893; *PrM* 208

CROSS REFERENCES: cc. 1445 § 1,1°, 1459 § 1, 1492 § 2, 1624

COMMENTARY

Antoni Stankiewicz

Although the "*querela nullitatis,*" as a means of challenging a null judgment, now constitutes a characteristic peculiar to the canonical process with regard to other modern legal systems, its formal source, according to an authoritative opinion, is the statutory development from the period of the Commons. Then it was received by medieval canonical doctrine and added, as a remedy characterized as the "burden," to other means of challenge, such as the appeal and the "*restitutio in integrum.*" Later, the plaint of nullity formally joined the "*Regolamento legislativo e giudiziario*" of Gregory XVI for civil matters of November 10, 1834 (§ 1101). Not until a more recent period did it find a place in the ecclesial norms for Apostolic tribunals that preceded the *CIC*/1917, that is, in the "*Lex propria*" of the Rota and of the Signature of June 29, 1908 (cc. 33 § 1, 37–38), and especially in the "*Regulae Servandae*" in the Apostolic Signatura of March 6, 1912 (arts. 1, 3, 4).[1]

According to the canonical tradition established with respect to the challenge of nullity of the judgment through "*exceptio,*" (*X* I, 38, 4) and later through "*actio,*" current norms also allow the plaint of irremediable nullity of the judgment to be proposed as an exception or as an action.

1. Cf. A. HANSSEN, *De nullitate processus canonici* (Rome 1938), pp. 10ff; H. EWERS, *Die Nichtigkeitsbeschwerde in dem kanonischen Prozessrecht* (Munich 1952), pp. 2ff; W.T. CURTIN, *The Plaint of Nullity against the Sentence* (Washington 1956), pp. 4ff; S. PLODZIEN, *Querela nullitatis* (Lublin 1959), pp. 44ff; O. ROBLEDA, "De nullitate sententiae iudicialis. Retractatur ius circa querelam contra sententiam," in *Periodica* 63 (1974), p. 10.

As an action, the plaint of nullity can be proposed only before the judge who pronounced the judgment and within a term of ten years (no longer thirty years, as provided in c. 1893 *CIC*/1917)[2] from the date of publication, that is, from the notification of the judgment (cf. cc. 1509, 1615, 1630 § 1).The plaint of nullity against a judgment of the Rota, however, must be presented before the Apostolic Signature (c. 1445 § 1, 1°).

As an exception, almost univocally with the "*exceptio natura sua perpetua*," in the sense of a procedural right antithetical to the action (c. 1492 § 2), the plaint of irremediable nullity can be lodged without time limitation before any judge. Thus, it could be presented before the judge who pronounced the judgment, for example, in the course of the proceeding for provisional execution (c. 1650 § 1) or definitive execution (c. 1653 § 1), or before a judge of a higher grade during the process on the fundamental issue of the case.

At times it is objected that the purpose of the exception is to resist the action, which cannot occur with the plaint of nullity presented "*per modum exceptionis*." However, it should be noted that here the term exception should be understood in its procedural meaning, that is, as the claim of a defect of nullity of the judgment, and more precisely, as a way to present a challenge due to nullity of the judgment. This "*exceptio*," therefore, is not intended to exclude the action of nullity of the judgment, but to eliminate the juridical efficacy of the judgment that is claimed to be null.

The acknowledgment of irremediable nullity of a judgment affects the entire process (and consequently, the process must be done over), provided that the reason for nullity affects at least indirectly its presuppositions (c. 1620,1°–2°, 4°–7°). Otherwise, only a new judgment will have to be pronounced (c. 1620, 3°, 8°). If the defect of nullity occurs in only a part of the process (c. 1620,5°–7°), that part must be done over and a new judgment must be pronounced.

2. *Comm.* 11 (1979), p. 146.

1622 **Sententia vitio sanabilis nullitatis dumtaxat laborat, si:**

1° lata est a non legitimo numero iudicum, contra praescriptum can. 1425 § 1;

2° otiva seu rationes decidendi non continet;

3° ubscriptionibus caret iure praescriptis;

4° non refert indicationem anni, mensis, diei et loci in quo prolata fuit;

5° acta iudiciali nullo innititur, cuius nullitas non sit ad normam can. 1619 sanata;

6° lata est contra partem legitime absentem, iuxta can. 1593 § 2.

A judgement is null with a nullity which is simply remediable if:

1° contrary to the requirements of can. 1425 § 1, it was not given by the lawful number of judges;

2° it does not contain the motives or reasons for the decision;

3° it lacks the signatures prescribed by the law;

4° it does not contain an indication of the year, month, day and place it was given;

5° it is founded on a judicial act which is null and whose nullity has not been remedied in accordance with can. 1619;

6° it was given against a party who, in accordance with can. 1593 § 2, was lawfully absent.

SOURCES: 1°: c. 1892,1°; *PrM* 207,1°
2°: c. 1894,2°; *PrM* 209,2°
3°: c. 1894,3°; CodCom Resp. XIII, 14 iul. 1922 (AAS14 [1922] 529); *PrM* 209,3°
4°: c. 1894,4°; *PrM* 209,4°

CROSS REFERENCES: 1°: cc. 1425 § 1 § 4, 1426
2°: cc. 51, 699 § 1, 1609 § 2, 1611,3°, 1612 § 3, 1617, 1668 § 3, 1670, 1720,3°
3°: cc. 535 § 3, 1504,3°, 1524 § 3, 1569 § 2, 1612 § 4
4°: cc. 1504,3°, 1612 § 4
5°: cc. 1433, 1437 § 1, 1511, 1598 § 1, 1600 § 3, 1656 § 2
6°: cc. 1507, 1508, 1510, 1592–1593, 1595

COMMENTARY

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When discussing the defects of remediable nullity of the judgment in general, it is useful to remember that their enumeration, according to the meaning of the adverb "*dumtaxat*" used in this canon,[1] should be restricted and exclusive. However, as will be seen below (see also commentary on c. 1620, 5°), the limits of derived nullity allow various phenomena to be established in which nullity of acts on which the judgment could be based appear, with the resulting nullity of this judgment.

1. *Lack of the lawful number of judges*

The lack of the lawful number of judges in cases requiring more than one, that is, three, in cases regarding the bond of holy ordination and of matrimony (c. 1425 § 1, 1°), results only in remediable nullity[2] of the judgment, and not irremediable nullity, as had been provided in the prior legislation (c. 1892,1° *CIC*/1917) which also included penal cases and contentious cases on the goods of the cathedral church (c. 1576 § 1 *CIC*/ 1917).The presence of a number of judges higher than that provided by law, however, does not affect the validity of the judgment. The same can be said when the conditions established in c. 1425 § 4 are present.

2. *Unmotivated sentence*

The motives for the judgment, that is, an indication of the reasons "*quae iudicem movent*" (*X* V, 27, 16) the decision, were already important in the medieval canonical tradition, although, the local custom of not expressing the "cause" in the judgment was tolerated precisely because of the help offered to the judge by the "*copia prudentum*" (ibid.) and yet, the judge was only obligated to explain judgments by which medicinal penalties were imposed in criminal proceedings, even under penalty of criminal sanctions and rescission of the judgment (*VI* V, 11, 1), and judgments that amended the appealed judgment, in appellate proceedings (*VI* II, 15, 1).[3]

1. Cf. *Comm.* 11 (1979), p. 146.
2. Ibid.
3. Cf. F. ROBERTI, *De Processibus*, II (Rome 1926), p. 185; J. LLOBELL TUSET, *Historia de la motivación de la sentencia canónica* (Zaragoza 1985), pp. 130ff; idem, "La genesis della sentenza canonica," in *Il processo matrimoniale canonico*, 2nd ed. (Vatican City 1994), pp. 722ff.

In subsequent centuries the obligation was established to explain the judgment for some special procedures. (This was done, for example, for civil matters in the "*Regolamento legislativo e giudiziario*" of Gregorio XVI, of November 10, 1834 §§ 282, 598, 4°; for matrimonial cases in the Instruction by Card. De Rauscher of February 2, 1856, § 194, and in the Instructions of 1883 of the Congregations of the Holy Office and of Propaganda Fide).[4] However, the sanction of nullity due to the absence of the motives "*tam in facto quam in iure*" only came to take effect in the "*lex propria*" of the Rota and of the Apostolic Signatura of June 29, 1908 (c. 32 § 3) and in the "*Regulae servandae*" before the Roman Rota of August 4, 1910 (§ 181,1°, c), which would be the sources of c. 1894, 2° *CIC*/1917.

The motivation required for the validity of the judgment explains the decision set forth in the dispositive part and justifies the option chosen by the judge through the reasoning based on the principles of law and on the relevant facts in the case. In this way, the ecclesial judicial function is rationalized, such that, beginning with the presentation of the logical "*iter*" of the judge, he demonstrates how his decision conforms to juridical and theological principles inherent to the norm applied to the specific case. The sanction of nullity, moreover, effectively protects the endo-procedural objective of the reasoning, which must justify the decisions in an easily comprehensible manner to the parties and the higher court in its function of jurisdictional control.

An absence of the motivation for the judgment must be distinguished from the insufficiency or the falsity of the reasons, which may particularly appear in connection with the facts of the case, and also from the contradictory, inconclusive, or irrelevant nature of the reasons set forth.

Jurisprudence on the part of the Rota also makes its reluctant to identify a lack of motivation with insufficient, inconclusive, or defective motives. This is because these latter situations are difficult to assess with objective criteria and it believes that the validity of a judgment can be upheld provided that there is some reasoning presented "*aliquo modo.*" This is because the judge is not obligated to set forth all the arguments justifying his decision, nor to resolve all the difficulties presented by the parties or their legal representatives.[5] The reasons for this are that motivation defects can be set forth in the appeal or in recourse to obtain a new resolution of the case.

It should be admitted, however, that the absence of the motivation is equivalent to a mere reference to the legal and factual reasons of another decision, unless this reference is made in a decree confirming the affirmative judgment, issued at the appeal level, pursuant to c. 1682 § 2.

4. Cf. no. 24 of both Instr., respectively in *CIC Fontes*, IV (Rome 1926), p. 399, no. 1076; and VII (Rome 1935), pp. 482–483, no. 4901.

5. Cf. c. PASQUAZI, March 17, 1957, in *SRR Dec* 49 (1957), p. 203, no. 7; c. MASALA, May 31, 1969, in *SRR Dec* 61 (1969), pp. 575–576, no. 3.

3. *Absence of the required signatures*

The full text of the judgment, "*ad valorem*," must bear the signature of the judge or all the judges, if it is a collegiate tribunal, even of the judge (or judges) in the minority during deliberation, and also of the notary.[6] It is not required that the signatures of all the judges be affixed simultaneously with or before the notary. However, it would not be sufficient to merely affix the initials of the given name and surnames.

If any of the judges of the collegiate tribunal should die in the period of time between the deliberation for the dispositive part and the drafting of the judgment, he or she must be replaced by another to renew the deliberations and sign the judgment. In this case, according to the practice admitted in the chancery of the Rota, only the remaining judges sign the judgment and a note by the notary is added. Of course, the notary's note cannot correct the judgment, but it prevents a later plaint of nullity and allows correction of the judgment with the passing of a term of three months (cf. c. 1623).

If, by an error, the judgment is signed by a judge other than the judge who should sign it, the same tribunal may provide the correction, pursuant to the provisions of c. 1616 § 1.

4. *Omission of the date and place of the sentence*

Just as with the signature on the judgment by the judge and the notary, the indication of the year, month, day, and place in which it was pronounced also shows the written nature of the judgment. The absence of this indication causes the judgment to be null as a written act. The nullity also affects the judgments when just one element is missing: the date or the place.For validity of the judgment, however, it is not required that it bear the seal of the tribunal.

5. *Sentence based on a null, non-remedied, act*

Although the efficacy of the correction "*ope sententiae*" is in itself suitable to restrict the scope of remediable nullity of the judgment resulting from null procedural acts, the conditions established in c. 1619, especially the exclusion of the causes of the public good (constituting the almost exclusive majority of those handled by ecclesiastical tribunals), from the remedy mechanism,[7] expose these causes to the effect of the nullity of the acts and of the judgment based thereon.

6. CPI, *Resp.*, July 14, 1922, in *AAS* 14 (1922), p. 529.
7. *Comm.* 15 (1984), p. 69.

At least some phenomena of nullity of acts established by law, and therefore by positive law, can end up in the sphere of natural law and by connection, they can become reasons for irremediable nullity of the judgment. In fact, these cases (except for the nullity of acts due to a lack of the signature of the notary (c. 1437 § 1), which can only affect the remediable nullity of the judgment), established by law (cc. 1433, 1511, 1598 § 1, 1600 § 3), can be included in the phenomena of irremediable nullity of the judgment due to denial of the right to defense.

Thus, the failure to notify the promoter of justice and the defender of the bond (c. 1433), if their exclusion is equivalent to a denial of the defense of the public good (cc. 1430–1432); the failure to notify the respondent (c. 1511) or to publish the acts (c. 1598 § 1), or new evidence (c. 1600 § 3), when it entails denial of the right to defense, must become phenomena of irremediable nullity of the judgment discussed in c. 1620, 7°. Otherwise, the nullity of acts in these cases only causes remediable nullity.

To these phenomena of remediable nullity, we can also add that caused by nullity of acts sanctioned by the oral process, if this process is used "*extra casus iure permissos*" (c. 1656 § 2), that is, when one of the parties (c. 1656 § 1) or the promoter of justice (c. 1693) has requested an ordinary contentious trial.

6. *Sentence delivered against a lawfully absent party*

The phenomenon of remediable nullity of the judgment established in this norm certainly "*praebet parti absenti conditionem favorabiliorem.*"[8] Therefore it refers to the options to challenge the judgment, if it is recalled that the prior legislation granted the party in contempt only "*beneficium restitutionis in integrum ad appellandum*" (c. 1847 *CIC*/1917).

The foundation, at least implicitly, on which this phenomenon of remediable nullity is based, certainly constitutes protection of the right to defense for the respondent who is lawfully absent from the proceedings. However, if the party declared absent proves the existence of a lawful impediment for his or her appearance at the trial and inability to prove it before the judgment (c. 1593 § 2), the party can not only use the plaint of nullity as a defect of remediable nullity, but also attempt to challenge the irremediable nullity of the judgment due to denial of the right to defense, regardless of how much the tribunal has proceeded regularly in resolving the case.

8. *Comm.* 11 (1979), p. 130.

1623 **Querela nullitatis in casibus, de quibus in can. 1622, proponi potest intra tres menses a notitia publicationis sententiae.**

In the cases mentioned in can. 1622, a plaint of nullity can be proposed within three months of notification of the publication of the judgement.

SOURCES: c. 1895; *PrM* 210

CROSS REFERENCES: cc. 1615, 1621, 1622, 1626 § 2

COMMENTARY

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The plaint of remediable nullity of the judgment for the reasons enumerated in c. 1622 can be proposed autonomously, that is, as an action or as an exception, within a term of three months from the notification of the publication of the judgment, that is, from the day (cf. c. 203 § 1) on which the party has had knowledge of the announcement of the publication.[1]

Although some believe that the plaint of remediable nullity cannot be proposed "*per modum exceptionis*," we cannot share that opinion. In fact, here it is an "*exceptio*" understood in the procedural sense, that is, as a way to propose the challenge (see commentary on c. 1621). Therefore, that exception is not endowed with the perpetuity, which is fitting (cf. c.1492 § 2), for the exception understood as a procedural right, dependent on the action and set up against it.

The term of three months to challenge the remediable nullity of the judgment is fixed (c. 1465 § 1). Therefore the judge cannot extend the term. If, during the term established by law, the judgment is not challenged, or the defect that caused the nullity is not corrected, (c. 1626 § 2) it is remedied "*ipso iure.*"

1. *Comm.* 11 (1979), p. 147.

1624 **De querela nullitatis videt ipse iudex qui sententiam tulit; quod si pars vereatur ne iudex, qui sententiam querela nullitatis impugnatam tulit, praeoccupatum animum habeat ideoque eum suspectum existimet, exigere potest ut alius iudex in eius locum subrogetur ad normam can. 1450.**

The judge who gave the judgement is to consider the plaint of its nullity. If the party fears that the judge who gave the judgement is biased, and consequently considers him suspect, he or she can demand that another judge take his place in accordance with can. 1450.

SOURCES: cc. 1893, 1895, 1896; *PrM* 208, 210, 211 § 4

CROSS REFERENCES: cc. 1445 § 1, 1°, 1447, 1450, 1621

COMMENTARY

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The judge who pronounced the judgment is competent to examine the plaint of irremediable (c. 1621) and remediable nullity of judgments proposed autonomously—except for judgments of the Rota (c. 1445 § 1, 1°), but understood not as the concrete person of the judge, but as the tribunal of a given grade of trial. Therefore, the judge of the higher grade is not competent to hear "*seorsim*" (c. 1895 *CIC*/1917) the plaint of nullity of the judgment pronounced by the lower grade.

It is questionable whether it is a limit of absolute incompetence "*ex functione*" or only relative incompetence. In our opinion, the limits of absolute incompetence are exceeded if the plaint of nullity is proposed before the judge of a higher grade (c. 1440) "*per modum actionis.*" They are not, however, exceeded if, during the course of the appellate proceeding "*per modum exceptionis,*" only "*incidenter,*" that is, when the judge of the higher grade has already acquired competence to hear the case in chief, against which judgment an exception of nullity is lodged. In fact, the established practice in the Roman Rota admits this way of proposing the plaint of nullity at the appellate level.

At the same grade of the proceedings in which the judgment accused of nullity was issued, law provides the possibility of substitution of the judge who pronounced it, at the instance of one of the parties. However, in order to recuse the judge, it is not sufficient to merely have a doubt as to

his impartiality. It must be based on some objective information for the issue to be resolved "*expeditissime*" (c. 1451 § 1).

The judge examining the plaint of remediable nullity of his judgment, if he perceives the defect of nullity inherent therein (c. 1622, 1°–4°), must renew the deliberation and publication of the judgment. In the case of derived nullity (c. 1622, 5°–6°), he must also renew the null acts and also pronounce a new judgment.

The decision of the judge when he rejects the plaint, as well as when he declares nullity of the judgment, is subject to challenge before the higher tribunal. If he is not challenged, the judgment becomes an adjudged matter (c. 1641, 2°) under the terms of the pronouncement.

1625 Querela nullitatis proponi potest una cum appellatione, intra terminum ad appellationem statutum.

Within the time-limit established for appeal, a plaint of nullity can be proposed together with the appeal.

SOURCES: c. 1895; *PrM* 210

CROSS REFERENCES: cc. 1629, 2°, 1630, 1633, 1634

COMMENTARY

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The judgment affected by nullity does not admit an appeal, only a plaint of nullity. However, for reasons of procedural economy, law allows the plaint of nullity to be accumulated with the appeal (cf. c. 1629, 2°) against the same judgment, in the case of remediable nullity as well as in the case of irremediable nullity. This is because the norm does not establish any distinction in this regard,[1] such that the accumulation takes place within the term established for the appeal, because the plaint is accumulated with the appeal only as an incidental matter and is therefore subject to the norms of the principal challenge.

The plaint of nullity together with the appeal must be proposed before the judge *a quo* within the fixed term of fifteen useful days from the notice of the publication of the judgment (c. 1630 § 1), and be pursued before the judge *ad quem* within the term of one month from the filing, unless the judge *a quo* has set a longer term for that purpose (c. 1633).

In the prior legislation, this accumulation was expressly allowed only for the plaint of remediable nullity of the judgment (c. 1895 *CIC*/1917), but doctrine and the continuous practice of the Roman Rota also extended it to irremediable nullity. Moreover, the practice of the Rota in causes related to the status of persons also admits the accumulation of the plaint of nullity with the recourse or the request for a new presentation of the case (c. 1644 § 1).[2]

If, once he has received the appeal with the plaint, the judge of a higher grade *ad quem*, declares the judgment null, he cannot pronounce on the case in chief, but he is obligated to send it to the judge of the lower

1. *Comm.* 11 (1979), pp. 147–148.
2. Cf. c. WYNEN, February 28, 1953, in *SRR Dec* 45 (1953), p. 159, no. 2; c. LEFEBVRE, November 16, 1965, in *SRR Dec* 57 (1965), p. 837, no. 14; c. GIANNECCHINI, May 21, 1982, in *SRR Dec* 74 (1982), p. 272, no. 1.

grade *a quo* who pronounced the null judgment (cf. c. 1669). We cannot share the opposite opinion that some maintain for the purposes of "*oeconomia iudiciorum.*" In fact, except in cases of nullity of marriage (c. 1683), at the appeal level, a new "*causa petendi*" cannot be validly admitted, even by way of useful accumulation (c. 1639 § 1). This is because the obstacle comes from the limits of functional competence or from the grade of the trial (c. 1440), which are absolute and unsalvagable. From the text of this norm, it also cannot be argued peremptorily in order to maintain a tacit extension of competence, because in the course of the formulation of the norm, the proposal to broaden the competence of the appeals judge to decide the case in chief "*tamquam in primo gradu*" was rejected,[3] as seen, for example, in cc. 1419 § 2 or 1683.

There is only one exception, related to the Roman Rota, which, as an established practice, was already continuously observed in the period of the preceding legislation (cf. c. 19). Once the nullity of the judgment of a lower tribunal has been declared, it also decides the case in chief, unless it is at the first grade. In this case, it needs the "*praevia commissio Sanctissimi.*"[4] The Apostolic Signatura, however, once the nullity of the judgment of the Rota is declared, refers the case in chief to the same Rota.

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3. *Comm.* 11 (1979), p. 148.
4. J.M. PINNA, *Praxis iudicialis canonica*, 2nd ed. (Rome 1966), p. 162. Cf. F. ROBERTI, *De processibus*, II (Rome 1926), p. 235; J.J. GARCÍA FAÍLDE, *Nuevo derecho procesal canónico*, 2nd ed. (Salamanca 1992), p. 256; c. PARISELLA, July 31, 1969, in *SRR Dec* 61 (1969), pp. 908–909, nos. 3–4; c. ANNÉ, October 21, 1975, in *SRR Dec* 67 (1975), p. 567, no. 3.

1626 **§ 1. Querelam nullitatis interponere possunt non solum partes, quae se gravatas putant, sed etiam promotor iustitiae aut defensor vinculi, quoties ipsis ius est interveniendi.**

§ 2. Ipse iudex potest ex officio sententiam nullam a se latam retractare vel emendare intra terminum ad agendum can. 1623 statutum, nisi interea appellatio una cum querela nullitatis interposita fuerit, aut nullitas sanata sit per decursum termini de quo in can. 1623.

§ 1. A plaint of nullity can be made not only by parties who regard themselves as injured, but also by the promotor of justice and the defender of the bond, whenever they have a right to intervene.

§ 2. Within the time-limit established in can. 1623, the judge himself can retract or correct an invalid judgement he has given, unless in the meantime an appeal joined to a plaint of nullity has been lodged, or the nullity has been remedied by the expiry of the time-limit mentioned in can. 1623.

SOURCES: § 1: c. 1897 § 1; *PrM* 211 § 1
§ 2: c. 1897 § 2; *PrM* 211 § 2

CROSS REFERENCES: § 1: cc. 1430, 1432, 1460 § 2, 1628, 1687 § 2, 1727, 1733 § 1, 1737 § 1
§ 2: cc. 1459 § 1, 1591, 1616 § 1, 1623

COMMENTARY

Antoni Stankiewicz

1. Legal standing to challenge a null judgment through a plaint of nullity devolves above all to the party who has participated in the process, although the power to challenge is not denied to the party that has been declared absent from the trial (cf. c. 1593 § 2).[1] However, in order to act validly, the party must also have an interest resulting from the harm, that is, he or she must consider him- or her-self injured ("*quae se gravatam putat*"), either formally, due to a rejection of one's petition (plaintiff), or materially, because the petition of the opposing party (respondent) has been accepted.

1. *Comm.* 11 (1979), pp. 130–131.

Along with the parties, the promoter of justice and the defender of the bond have standing to lodge a plaint of nullity, not because of their own prejudice, but by virtue of the public function with which they are entrusted to defend the ecclesial public good. Therefore, it is not necessary that the promoter of justice adopt the role of a party (cf. cc. 1674, 2°, 1721) in the case in which the judgment is claimed to be null. This is because it is enough for him to have the right to intervene in a given case, and the same can be said of the defender of the bond (cc. 1430–1432, 1696).

Lastly, this power to lodge a plaint of nullity also devolves upon the heir of a deceased party or his or her successor in the litigation (cf. c. 1518, 2°).

2. The judge, who has pronounced a null judgment, if he notices the defect of nullity, can revoke and correct it (cf. c. 1897 § 2 *CIC*/1917; *PrM* 211 § 2). This power of the judge is not limited only to cases of remediable nullity, as some maintain, but also refers to irremediable nullity. In fact, the term for revocation or correction, established by reference to c. 1623, must be considered autonomous. Otherwise, a longer term would prevent correction of the remediable nullity due to the correction already taking place due to the expiry of the time. Moreover, as maintained by an authoritative opinion, under the prior legislation, the judgment always affects the public good. Therefore "*iudex potest quamlibet sententiae nullitatem relevare*,"[2] and thus he can correct it ex officio, especially if they are not defects related to the procedure, but which directly affect the judgment.

Therefore, the judge can correct any dispositive part that is defective in the judgment, when the judgment has left the dispute unresolved (c. 1620, 8°). He can add any missing motives (c. 1622, 2°), any missing signatures (c. 1622, 3°) or the date and place of the judgment (c. 1622, 4°). With regard to other remediable or irremediable defects of nullity, which entail the need to repeat the process or a part thereof, the participation of the parties is required, in accordance with law. Moreover, in causes for the private good, the judge cannot redo the process without the consent of the parties, and he must act at the request of one of them (c. 1452 § 1).

Revocation or correction of the judgment affected by nullity is prevented once an appeal is lodged against it with the plaint of nullity. This is because in this case, the competence over the nullity is shifted to the appeals judge. Additionally, if it is remediable nullity, it is also prevented when the judgment has been corrected by expiry of the term of three months (c. 1623).

The judge decides on the revocation or correction of the null judgment through an explanatory decree (cf. c. 1591, 1616 § 1, 1617).

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2. F. ROBERTI, *De processibus*, II (Rome 1926), p. 233; M. LEGA-V. BARTOCCETTI, *Commentarius in iudicia ecclesiastica*, II (Rome 1950), p. 1032.

1627 Causae de querela nullitatis secundum normas de processu contentioso orali tractari possunt.

Cases concerning a plaint of nullity can be dealt with in accordance with the norms for an oral contentious process.

SOURCES: *SNAS* 31–33

CROSS REFERENCES: c. 1656 § 1

COMMENTARY

Antoni Stankiewicz

In current canonical legislation, causes of nullity of the judgment lodged autonomously with the plaint of nullity can be handled and decided through the oral contentious process.[1]

If the plaint of nullity is lodged together with the appeal, it must follow the "*modus procedendi*" followed in the appealed case in chief, because the plaint is joined to the appeal as an incidental challenge and is governed by the norms of the appellate procedure. However, taking into account the fact that incidental matters arising in the course of the ordinary contentious process, and which must be resolved by an interlocutory judgment, must be handled according to the oral contentious process, unless the judge provides otherwise due to the gravity of the issue (c. 1590 § 1), there is nothing to prevent the plaint of nullity from being decided prior to the final decision through the oral process.

However, in both situations, one of the parties (c. 1656 § 1), the promoter of justice (cf. c. 1693 § 1), or the defender of the bond, may ask that the cause of nullity of the judgment follow the ordinary contentious process. That request must be considered in every case. Otherwise, if the oral process were followed when not permitted by law, it would cause nullity of the judicial acts and of the judgment (c. 1656 § 2; cf. c. 1622, 5°).

In the case of the joining of the plaint of nullity to the recourse to obtain a new presentation of the cause, the issue of nullity must be handled according to the oral process, inasmuch as the ordinary contentious process is not provided for a new examination of the cause (cf. c. 1644 § 1).

1. *Comm.* 11 (1979), p. 148; cf. cc. 1656–1670.

In the Roman Rota, the plaint of nullity is usually handled through an incidental proceeding "*per memoriale*" and is decided with an explanatory decree (NTRR 75).

The petition containing the plaint of nullity, which must be presented before the judge who pronounced the judgment (cc. 1621, 1624) or, if joined to the appeal, before the judge of the higher court (c. 1625), must set forth the reasons for nullity, as required for any document introducing the litigation (cf. cc. 1504, 1658).

Although, in cases of matrimonial nullity, the judgment is pronounced by a collegiate tribunal (c. 1425 § 1, 1° b), the plaint of nullity against these judgments can be heard by a sole judge, since the special norm for the oral process so allows (cc. 1657, 1441). However, the sole judge may use two assessors (c. 1424), and if the issue of nullity presents any particular difficulty to resolve, a collegiate tribunal can judge it (cf. c. 1425 § 2).

CAPUT II
De appellatione

CHAPTER II
The Appeal

1628 **Pars quae aliqua sententia se gravatam putat, itemque promotor iustitiae et defensor vinculi in causis in quibus eorum praesentia requiritur, ius habent a sententia appellandi ad iudicem superiorem, salvo praescripto can. 1629.**

Without prejudice to the provisions of can. 1629, a party who considers himself or herself to be injured by a judgement has a right to appeal from the judgement to a higher judge; in cases in which their presence is required, the promotor of justice and the defender of the bond have likewise the right to appeal.

SOURCES: c. 1879; NSRR 154; PrM 212 §§ 1 et 2

CROSS REFERENCES: cc. 221, 1430, 1432, 1438, 1439, 1444, 1593 § 2, 1629

COMMENTARY

Paolo Moneta

The appeal constitutes the most common and widespread means of challenging a judgment. It is defined as the *ordinary* means of challenge, because it is not subject to the existence of particular reasons or specific defects in the judgment, but rather seeks to make effective [sic] a *generic injustice* thereof. Consequently, the appeal is characterized by the unlimited nature of censure carried out against a judgment, and by the indeterminate nature of the reasons allowing its presentation. It also has a *remitting effect*, in the sense that it transfers to the judge of the challenge all questions arising in the preceding procedure. It also has a *substituting*

effect, because it directly leads to a new decision in the case, intended to take the place of the challenged judgment and to take precedence over the effect thereof.

The appeal is a general remedy that can be proposed, in principle and barring any express legislative derogation, against any judgment (and also against judicial rulings of any type by other names, such as decrees, when they take on the substantial characteristics of a judgment). In this regard, a true and proper right is established, expressly recognized by the legislator ("ius habent ... appellandi"), which is incorporated into a broader right, referring to all the faithful (cf. c. 221), to obtain a judicial decision that is really consistent with the truth and that puts justice to work in the fullest sense.

The right to appeal is nonetheless limited to the subjects who have been involved in the proceedings and are directly affected by the decision contained in the judgment. Therefore only the parties to the matter, be they private (petitioner, respondent, possible joint litigants) or public (promoter of justice, defender of the bond), in cases in which their participation is required in the litigation, can appeal. The parties do not need to have participated in the proceedings in a specific way, nor does the party declared absent even lose the right to appeal (c. 1593 § 2), contrary to what occurred in the previous juridical system, which declared a judgment issued against a contumacious party who "a contumacia se non purgaverit" (c. 1880, 8° *CIC*/1917) cannot be appealed. If a party dies before being able to exercise the right of appeal (or other events affect the party's legal capacity, such as a change in status or cessation of office by which one is acting), his or her successor taking the subjective juridical position to which the party had a right may challenge the judgment.

However, the mere right to a legal position is not sufficient, because an appeal, as any other juridical instrument, also must have an actual benefit, must be intended to satisfy an interest worthy of protection. This interest arises only if the party can invoke an injustice that results from the judgment, which affects said party. The party can claim to have suffered prejudice ("*se gravatam putat*") as a result of a disregard of that benefit he or she (as a petitioner or as a respondent) asked to have recognized in a court of law. This is valid for private parties, who therefore must perceive a personal prejudice ("harm"), affecting the subjective juridical situation to which they have a right, that is, feel that they are in conditions of *having succumbed* to the judge's decision. In cases in which a public interest transcending the personal interest of the litigants comes into play, the prejudice suffered by the party is assessed in connection with the judgment and the effects it has on the substantial subjective juridical situation to which the party has a right, irrespective of the procedural role the party plays. Therefore, this also acknowledges the right to appeal of the party who submits to the justice of the court, without having taken any defensive action, and even to the party who has obtained a pronouncement

in keeping with his or her claims. For example, a respondent spouse who at the first instance had opposed the petition for nullity may also appeal against a judgment confirming the validity of the marriage.

In the event that the parties are public parties, the prejudice resulting from the judgment cannot, however, impinge on general interests affecting the entire community. A belief that in fact said prejudice exists is broadly and indefinitely attributed to the promoter of justice, who has the role of generally defending the public good ("officio tenetur providendi bono publico," c. 1430). On the other hand, that belief is more limited in the case of the defender of the bond, who is obligated to defend, albeit within the limits of reasonableness ("rationabiliter"), the concrete public interest in connection with the stability of marriage and of the sacred ordination (c. 1432).

Therefore, he cannot appeal against any judgment (even if he considers it unjust) that confirms the validity of these sacraments and that, because it is such, is not suitable to prejudice the specific public interest. In that both offices are created to protect the *bonum publicum*, the promoter of justice and the defender of the bond are not bound by any specific position that they have adopted in the course of the proceedings. Therefore, they may also appeal any judgment that has accepted their conclusions if, after deeper assessment, they realize that it negatively affects the public interest that they are obligated to defend.

The judge superior to the judge who has issued the judgment considered unjust is competent to rule on the appeal. If it is a judgment that has decided the case for the first time, it will be necessary to resort to the tribunal of second instance, that is, the judicialbody that, according to the specific rules of universal (cc. 1438–1439) or particular law, is at that level in canonical rules. However, it must be understood that it is always possible to also direct the appeal to the Apostolic Tribunal of the Roman Rota, which has general competence concurrent with that of the ordinary tribunal of second instance (c. 1444 § 1). Against judgments pronounced in second instance (which have not become adjudged matters; see commentary on c. 1629), the appeal is lodged with the Apostolic Tribunal of the Roman Rota (c. 1444 § 2) or with another court having competence at the third instance, by virtue of special legislative provisions (as occurs, for example, with the Rota of the Apostolic Nunciature in Spain). Judgments pronounced by the Roman Rota in the first instance (in cases in which it is also competent, as an exception, at this phase of the litigation), or in second instance, they are subject to appeal in the same tribunal, before the panel composed of the three auditors who immediately precede, by order of seniority, those who pronounced the judgment.

1629 Non est locus appellationi:

1° a sententia ipsius Summi Pontificis vel Signaturae Apostolicae;

2° a sententia vitio nullitatis infecta, nisi cumuletur cum querela nullitatis ad normam can. 1625;

3° a sententia quae in rem iudicatam transiit;

4° a iudicis decreto vel a sententia interlocutoria, quae non habeant vim sententiae definitivae, nisi cumuletur cum appellatione a sententia definitiva;

5° a sententia vel a decreto in causa de qua ius cavet expeditissime rem esse definiendam.

No appeal is possible against:

1° a judgement of the Supreme Pontiff himself, or a judgement of the Apostolic Signatura;

2° a judgement which is null, unless the appeal is lodged together with a plaint of nullity, in accordance with can. 1625;

3° a judgement which has become an adjudged matter;

4° a decree of the judge or an interlocutory judgement, which does not have the force of a definitive judgement, unless the appeal is lodged together with an appeal against the definitive judgement;

5° a judgement or a decree in a case in which the law requires that the matter be settled with maximum expedition.

SOURCES: 1°: c. 1880,1°; NSSA 58 § 2, 77, 82
2°: c. 1880,3°
3°: c. 1880,4°; NSRR 161
4°: c. 1880,6°; NSRR 114 § 1; PrM 215 § 1
5°: c. 1880,7°

CROSS REFERENCES: cc. 1372, 1404, 1405, 1445, 1451 § 1, 1505 § 4, 1513 § 3, 1527 § 2, 1587, 1589 § 1, 1618, 1622, 1625, 1631, 1641, 1644, 1683

COMMENTARY

Paolo Moneta

Although it is a general means of challenge, that may, in principle, be used against any judgment, the appeal is also subject to some inevitable limitations, expressly indicated by the legislator of this canon. In that they

are exceptions to a general principle, they must be considered restrictive and subject to strict interpretation (c. 18).[1]

1. The first area of the finality, or "unappealability" of an appeal refers to judgments issued by the Roman Pontiff himself or the Supreme Tribunal of the Apostolic Signatura. This case relates to the constitutional structure of Church governence, which provides for an authority at the top, the Roman Pontiff, endowed with supreme and full power over all the faithful. This power, because it is full and supreme, cannot be subject to any type of revision, control, or challenge ("Prima Sedes a nemine iudicatur," as stressed by the *CIC* in c. 1404). Possible judicial pronouncements issued by the Ecumenical Council must also be considered unappealable, in that they are solemn expressions of the Episcopal College that is also endowed with full and supreme power over all the Church. This common position of supremacy possessed jointly by the Pope and the Episcopal College renders any form of appeal against either authority impossible. We would also like to add that recourse to the Ecumenical Council against an act of the Pontiff is considered a delict and is sanctioned under the pain of censure (c. 1372).

"Unappealability" refers to judgments pronounced personally by the Pontiff, in cases in which he has exclusive competence to judge (c. 1405 § 1), as well as any cases he has found suitable to call to himself for his own ruling. The Pontiff does not, however, directly exercise judicial power, but usually requests it from the Tribunals of the Apostolic See (usually the Roman Rota or, in special cases, any body expressly constituted therefor, to whom the judicial function is delegated). Judgments issued in these cases must be deemed subject to the normal appeal rule, unless the Pontiff has included an express unappealability clause ("*appellatione remota*").

The possibility of an appeal against judgments of the Supreme Tribunal of the Apostolic Signatura is excluded, due to the same position as an body situated at the top of the judicial structure of the Church. Contrary to what occurs for the other apostolic tribunal, the Roman Rota, which decides according to a precise rule of rotation among the various judicial panels, the unitary structure of this tribunal could hardly allow any form of challenge within the same tribunal. An exception to the unappealability of the judgments of the Apostolic Signatura is provided nonetheless in NSAA, which regulates the functioning of this tribunal in regard to decisions related to proceedings pursued against auditors of the Rota and the advocates (arts. 58 § 2, 77 and 82). However, more than an appeal in the technical sense, it seems to be a type of *beneficium novae audientiae*, a review of the case, granted (in this case not with discretion, but by virtue

1. Cf. M. LEGA-V. BARTOCCETTI, *Commentarius in iudicia ecclesiastica*, II (Rome 1950), pp. 979ff; F.X. WERNZ-P. VIDAL, *Ius canonicum*, VI. *De processibus* (Rome 1927), p. 558.

of an express legislative provision) by the same authority that issued the decision.[2]

Lastly, although the canon does not mention them expressly, judgments of the Rota issued, in very exceptional cases, by the judicial College as a whole (*"videntibus omnibus"*),[3] should not be considered subject to appeal. In this case, there is no jurisdictional body of a higher grade. The Apostolic Signatura, which is competent to reexamine judgments of the Rota only in cases strictly indicated by law (c. 1445 § 1) cannot be considered as this type of body

2. Appeal is no longer possible when the challenge is not intended to attribute effects to a generic injustice of the judgment, but rather to a specific defect affecting the validity thereof, causing its nullity. In this case, the legislator has designed a special method for challenging, the *querela nullitatis*, which, unlike the appeal, is lodged before the same judge who has pronounced the judgment (c. 1621). In the prior juridical system, the principle of unappealability was considered valid only for judgments having an *irremediable* defect of nullity.[4] This limitation, lacking any express indication in the legislation, no longer has any reason to exist. Therefore judgments having a defect of nullity, which is considered remediable within the meaning of c. 1622, should also be deemed unappealable.

However, the presence of a defect of nullity does not prevent the judgment from being unjust from a more general point of view and therefore capable of causing prejudice that normally entails a right to appeal for the party negatively affected by the ruling. In this case, for the sake of judicial economy, both challenges can be combined and lodged jointly before the same judge, who will be the same judge who is competent for the appeal, because he is the one having broader power to review the judgment. In proceedings lodged in this way, the exception of nullity must be considered first, because it logically has priority. If it is denied, the case will proceed to review the judgment according to the rules usually provided for an appeal.If, however, an exception of nullity is granted, the cause normally must be sent to the previous judge for the case in chief to be reconsidered. In matrimonial cases, for the sake of judicial economy and taking into account the authority enjoyed by the appeals judge to give judgment on new grounds of nullity as a judge of the first instance (c. 1683), it seems preferable to consider that this is the same judge who must also handle the principle case.[5]

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2. For a more profound analysis of the problem, cf. J. LLOBELL, "Note sull'impugnabilità delle decisioni della Segnatura Apostolica," in *Ius Ecclesiae* 5 (1993), pp. 675ff.

3. Cf. F. ROBERTI, "De appellatione a sententia rotali prolata 'videntibus omnibus'," in *Apollinaris* 2 (1929), pp. 75–76; idem, *De processibus*, I, 4ª ed. (Vatican City 1956), p. 358.

4. Cf. M. LEGA-V. BARTOCCETTI, *Commentarius in iudicia...*, cit., p. 981.

5. Cf. the persuasive arguments developed in this regard by J.M. SERRANO RUIZ, "La querela di nullità contro la sentenza (commentary on cc. 1619–1627)," in *Il processo matrimoniale canonico* (Vatican City 1988), pp. 352ff.

3. The appeal reaches its juridical limit when the judgment becomes an adjudged matter. Due to a non-renounceable demand for the certainty of law, there cannot be infinite possibilities for requesting the review of a judicial pronouncement. There comes a time in which the judgment must be established as a conclusive resolution of the dispute,and must definitively apply law to the specific case. At this time, the judgment becomes an *adjudged matter*, functions as the norm between the parties and can no longer be subject to appeal. At what point this adjudged matter situation should be considered reached, is a problem that each juridical system resolves autonomously, seeking a balance, according to the manner considered most appropriate in each case, between aspirations towards greater justice and the demands of the certainty of law. Canon law, in this regard, provides precise regulations in c. 1641, to which we are referring. The situation of an adjudged matter, always for the purposes of unappealability of the judgment,is compared to the definitive character or in the situation of a *quasi- adjudged matter* obtained in cases on the status of persons after two conforming judgments. In this case, a particular type of challenge is admitted, the "nova causae propositio," which is subordinate to the discovery of new and serious elements of proofs or arguments (c. 1644).

4. Normally an appeal is admitted against judgments settling the litigation, which exhausts the function for which the judicial body in question has received power. Consequently, decisions called *interlocutory* decisions, which the judge can be obligated to adopt in the course of the process to resolve incidental matters, are not appealable. That is, they are those questions proposed in the scope of a case that has already begun, which have a connection to the principle case and usually need to be resolved before this main case (cf. in this regard c. 1587). These decisions, which, depending on the importance or complexity of the matter to be resolved, can adopt the more simple formal issuance of a decree or an interlocutory judgment (c. 1589 § 1), can be appealed albeit at a second instance, together with the appeal against the judgment settling the litigation. With this successive appeal, it is possible to obtain a remedy for possible errors committed in the decision on the incidental matter and for the resulting injustice that may have affected the decision of the principle case.

However, this type of remedy is precluded when the interlocutory decision is such that it does not allow the case to continue, either absolutely or in connection with one of the parties to the litigation. If the incidental matter refers, for example, to a procedural presupposition (such as the active standing of one of the parties), or to a requirement affecting the valid performance of the judicial function required in a specific case (such as the existence of jurisdiction at the head of the judicial body), the decision regarding said interlocutory matter, if it possesses some content, can preclude the subsequent course of the litigation (or eventually of one of its instances). That is, it can adopt the substantial efficacy of a definitive judgment, because it is capable of definitively resolving the dispute (cf. in this regard c. 1618).

Not allowing the party to lodge an appeal against one of these pronouncements would mean depriving this party of the right to assert before a higher body the injustice committed in the resolution of a dispute, which right belongs to all the faithful. Thus is born the rule that the decree or the interlocutory judgment is commonly subject to appeal when they have the value of a definitive judgment (*"vim sententiae definitivae"*).

An appeal against incidental decisions has always caused problems and differences in interpretation due to the need to make two contrary demands consistent. These are: the need to avoid delays (even more so if it is intentional on the part of the appellant) in the development of the case, and the need to not deprive the parties of the right to obtain reparation for any type of injustice resulting from a pronouncement by an ecclesiastical judge. This latter demand seems to have prevailed up until now in the law of the Church, to the point that it has led ecclesiastical jurisprudence to very broadly interpret the legislative provisions in this respect, and to admit appeals against all types of interlocutory decisions that have caused *harm* that is irremediable or very difficult to remedy.[6] Even the restrictive approach taken by the *CIC*/1917, which had limited the possibility of an appeal against an interlocutory judgment *"quae habeat vim definitivae,"* and had excluded it for decrees (c. 1880, 6° *CIC*17), had been overruled especially after the publication of *PrM*. In *PrM*, although it was only for nullity of marriage cases, the appeal was provided not only for interlocutory judgments but also for decrees, and the concept "vis sententiae definitae" was extended to include any decision entailing an irremediable prejudice with the definitive judgment, including (as expressly indicated as an example) judgments that rejected evidence that could truly influence the final decision (*PrM*, 214).[7] However, the *CIC* has readopted the restrictive approach of the *CIC*/1917. It has eased that approach, when equating the judgment with the decree (thereby recognizing that the decree can also adopt the force of a definitive decision, and therefore may turn out to be not substantially different from a judgment, except in its formal manifestation or denomination). It has also, however, stressed the restrictive orientation when it extends the number of decisions that are expressly subject to an unappealability clause (which is, as we shall soon see, the clause *"expeditissime"*), and when it also includes among these expressly unappealable decisions some of those that most frequently lend themselves to challenges (such as the one dealing with the rejection of a means of evidence or on the very right to appeal).

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6. Cf. P. PELLEGRINO, "Sull'impugnabilità dei provvedimenti interlocutori nel nuovo codice di diritto canonico," in *Studi in memoria di Pietro Gismondi*, II (Milan 1991), pp. 113ff; idem, *I provvedimenti interlocutori nella teoria canonistica delle impugnazioni* (Padova 1969).

7. On art. 214 of PrM and the jurisprudence of the Rota in this regard, cf. J. TORRE, *Processus matrimoniales* (Naples 1956), pp. 408ff.

5. Lastly, it excludes appeals for all pronouncements (judgments or decrees) made in a case when the law requires that it be decided as quickly as possible ("*expeditissime*"). Here the legislator has tried to give absolute prevalence to the speedy trial requirements, adding to certain decisions an express unappealability clause, similar to the traditional clause "*appellatione remota*" that the Pontiff at times added when he delegated his own judicial power.[8] The *CIC* establishes that the following matters must be decided "*expeditissime,*" those involving the recusation of judges, of the promoter of justice, or the defender of the bond (c. 1451 § 1); rejection of the petition (c. 1505 § 4); defining of the terms of the controversy, at the stage of the proceedings when the doubts are agreed upon (c. 1513 § 3); rejection of a type of proof by the judge (c. 1527 § 2); admission of an incidental matter (c. 1589 § 1); and those affecting the very right to appeal (c. 1631). They are cases set forth specifically and cannot be extended to other cases by analogy. Their number has increased considerably from those established in the *CIC*/1917, which only established this unappealability clause for a decision regarding a recusation of the judge (c. 1616 *CIC*/1917), on the rejection of the petition (c. 1709 *CIC*/1917), and on attempts while the case is pending (c. 1856 § 2 *CIC*/1917). This latter issue is not regulated by the *CIC*. As we recently noted, it is quite telling of the legislative orientation intended to serve the demands of speediness of the trial to include in this category of expressly unappealable decisions the decree by which the judge refuses to admit a type of proof, which decree was expressly considered appealable by *PrM*, 214 when dismissed proofs "in iudicium ferendum vere influere possunt."

With respect to each of the cases of unappealability, a difference in interpretation has arisen about the decree pronounced by the president of the college of judges rejecting a petition, and confirmed by the entire college as a result of a recourse against a decree of rejection (c. 1505 § 4). Along the lines in which even a pronouncement of the Rota[9] is incorporated, an appeal to a higher tribunal against the decision to reject by the college of judges would be allowed, because the clause of unappealability provided by the legislator ("quaestio autem reiectionis *expeditissime* definienda est," c. 1505 § 4) would refer not to the decision of the college, but to the decision made by the court of appeals as a consequence of the recourse against the decision of the college, which recourse would therefore be considered admissible.

Prevalent jurisprudence, however, unlike that approach, tends to admit, instead of an appeal, the extraordinary remedy of the *restitutio in*

8. Cf. M. LEGA-V. BARTOCCETTI, *Commentarius in iudicia...*, cit., p. 983.

9. Cf. A. STANKIEWICZ, "De libelli reiectione eiusque impugnatione in causis matrimonialibus," in *Quaderni Studio Rotale* 2 (1987), pp. 87ff; S. VILLEGGIANTE, "Le questioni incidentali," in *Il processo matrimoniale canonico..*, cit., pp. 23ff. This opinion appears in the jurisprudence of the Romen Rota with the decree c. STANKIEWICZ, May 24, 1984, mentioned in A. STANKIEWICZ, *De libelli reiectione...*, cit., pp. 80–81.

integrum against a decree definitively rejecting a petition, based on the belief that this decree constitutes a definitive decision, equivalent to a judgment that has become an adjudged matter.[10]

The *CIC* no longer contemplates among the phenomena of unappealability of the judgment, the case of a waiver of the appeal by the party that would have had the right to lodge it (cf. c. 1880, 9° *CIC*/1917). From the preparatory work, it is evident that this situation has been intentionally deleted for the purpose of leaving the parties free to make that difficult decision, albeit within the restrictive limits established by law.[11] With more reason, regarding the appealability of the judgment, no emphasis can be attributed to tacit consent or waivers, which could arise from conduct denoting acceptance or voluntary execution of the judgment.

10. Cf. c. BRUNO, May 23, 1986; c. PINTO, March 23, 1987, both in *Quaderni Studio Rotale* 2 (1987), pp. 99ff and 107ff.
11. Cf. *Comm.* 11 (1979), p. 150.

1630 **§ 1. Appellatio interponi debet coram iudice a quo sententia prolata sit, intra peremptorium terminum quindecim dierum utilium a notitia publicationis sententiae.**

§ 2. Si ore fiat, notarius eam scripto coram ipso appellante redigat.

§ 1. The appeal must be lodged with the judge who delivered the judgement, within a peremptory time-limit of fifteen canonical days from notification of the publication of the judgement.

§ 2. If it is made orally, the notary is to draw up the appeal in writing in the presence of the appellant.

SOURCES: § 1: c. 1881; NSRR 155, 156 § 1; PrM 215 § 1
§ 2: c. 1882 § 1

CROSS REFERENCES: cc. 15, 201 § 2, 1486 § 2, 1503, 1518, 1615, 1644

COMMENTARY

Paolo Moneta

The appeal must be lodged with the judge who delivered the judgment by presenting or sending to the secretary of the tribunal a formal written statement. Similar to what is provided for the presentation of the petition introducing the case (c. 1503), the appeal may also be lodged with an oral statement, which nonetheless must be written down by a notary in the presence of the same appellant. The appeal may be lodged personally by the party, and also by his or her procurator, who maintains the right and duty to appeal provided that the party has not expressly revoked it (c. 1486 § 2). It is understood that an appeal lodged directly with the higher judge, before it is lodged with the judge who pronounced the judgment, is also admissible. In fact, the law only relates the lapse of the appeal to the failure to respect the peremptory time limit.[1]

The lodging of the appeal is subject to the time limit of fifteen days from the notification of the publication of the judgment. It is a *peremptory* term. Therefore, if it is not observed, it may cause the appeal to lapse. But it is also a useful term, which does not run, as provided in c. 201 § 2,

1. Cf. M. LEGA-V. BARTOCCETTI, *Commentarius in iudicia ecclesiastica*, II (Rome 1950), p. 986.

against a party who is unaware of it or cannot in fact act. But the term provided could hardly be extended as a result of these latter circumstances. In fact, according to general principles (cf. c. 15), ignorance cannot exempt with regard to the appeal or the legislative provisions indicating its mode of application.Ignorance of the judgment is impossible, however, because the time runs from the notification of the publication (and therefore from a knowledge) of the same judgment.

Moreover, the fact that the faculty to appeal is also attributed to the procurator, seems in principle to indicate that an inability to act is avoided. The only case that could be considered a possibility is the death of one of the parties to the matter and the occurrence of other comparable facts, such as a change in status or cessation from office by virtue of which someone acts in a litigation. Contrary to what was established in the *CIC*/1917 (c. 1885), the *CIC* does not contain an express provision in this regard. Therefore it is necessary to refer to the general principles regulating the suspension of the instance as the effect of the aforementioned facts (as is also evident from the preparatory work for the *CIC*)[1] and to consider that the time limit for appeal remain suspended until the heir or successor is notified of the judgment.

The term of fifteen days runs from the *knowledge* of the publication of the judgment. Taking into account the methods established for publication (c. 1615), the term runs from the day a copy of the judgment is delivered to the parties or to their procurators, or from the day they have received a copy of the judgment sent them according to the means normally provided for notification of judicial acts (c. 1509). Lastly, it should be taken into account that this term is not considered peremptory for causes on the status of persons and, in particular, for matrimonial causes. The legislator does not expressly indicate this, but it is inferred from the current special provisions for this type of case, in particular c. 1644, to which commentary we are referring (cf., in this sense, the statement of the Apostolic Signatura of June 3, 1989[2]).

1. Cf. *Comm.* 11 (1979), p. 152.
2. Cf. *Monitor Ecclesiasticus* 115 (1990), pp. 27ff; *Ius Ecclesiae* 2 (1990), pp. 343ff.

1631 Si quaestio oriatur de iure appellandi, de ea videat expeditissime tribunal appellationis iuxta normas processus contentiosi oralis.

If a question arises about the right of appeal, the appeal tribunal is to determine it with maximum expedition, in accordance with the norms for an oral contentious process.

SOURCES: NSRR 159 §§ 1 et 2; PrM 215 § 2

CROSS REFERENCES: cc. 1589, 1629, 1657–1670

COMMENTARY

Paolo Moneta

It does not fall to the judge who issued the judgment to assess the admissibility of the appeal lodged before him. Even if a challenge may from the beginning seem *frivola et frustratoria* (according to the terms used in a decree of Clement IV, who in that case admitted the rejection by the judge *a quo*),[1] that judge must limit himself to receiving the appeal and sending the acts to the judge who is competent in the next process (c. 1634 § 3). Therefore, the issue of the right to appeal can be raised only before this latter judge, once the appellant has officially vested him as the judge for the case through the act of pursuing the appeal considered below in c. 1633. This question can be raised by the opposing party or by the judge himself, inasmuch as it is a procedural presupposition of a public nature that, as such, can also be notified ex officio. For example, it can refer to the appellant's lack of standing or an interest in the challenge, to a lapse because the time limits have expired, to unappealability of the judgment, to incompetence of the judge, to cessation of the issue of the litigation, or to another issue annulling the action. The question must be decided as quickly as possible ("expeditissime") by the same judge who takes charge of the appeal, adopting the norms established for the oral contentious process (cc. 1657–1670). This precise indication of the legislator seems to prevent the judge from deciding the matter by decree (and therefore in the most expeditious manner, without observing precise rules to the contrary) or forwarding the resolution at the time in which the principal matter is

1. Cf. M. LEGA-V. BARTOCCETTI, *Commentarius in iudicia ecclesiastica*, II (Rome 1950), p. 989.

decided, as provided, in general, for the resolution of incidental matters (c. 1589).

The legal provision that forces the case to be decided as quickly as possible ("expeditissime") renders the decision being pronounced unappealable (c. 1629, 5°). This decision, when it establishes the inadmissibility of the appeal, takes on the efficacy of a definitive judgment and ends the process (cc. 1618, 1629, 4°).

1632 **§ 1. Si in appellatione non indicetur ad quod tribunal ipsa dirigatur, praesumitur facta tribunali de quo in cann. 1438 et 1439.**

§ 2. Si alia pars ad aliud tribunal appellationis provocaverit, de causa videt tribunal quod superioris est gradus, salvo can. 1415.

§ 1. If there is no indication of the tribunal to which the appeal is directed, it is presumed to be made to the tribunal mentioned in cann. 1438 and 1439.

§ 2. If the other party has resorted to some other appeal tribunal, the tribunal which is of the higher grade is to determine the case, without prejudice to can. 1415.

SOURCES: § 2: PrM 216 § 2

CROSS REFERENCES: cc. 1415, 1438, 1439, 1444 § 1, 1620, 1°, 1637

COMMENTARY

Paolo Moneta

The tribunal of second instance is competent to judge the appeal. This tribunal was specifically designated by the norms regulating the judicial structure of the Church. These norms can be general (cc. 1438–1439), or particular, for a given territory (such as, for example, those provided for Italy by the mp *Qua cura* of December 8,1938, which provides a judicial structure with a regional basis for handling matrimonial cases). However, concurrent with this ordinary tribunal of appeals, general competence is provided for the Roman Rota in connection with any judgment pronounced by an ecclesiastical tribunal of the first instance (c. 1444 § 1).

In the written document by which the appeal is lodged, the appellant will usually indicate which tribunal he or she is asking to review the case. This indication, however, is not necessary. If it is missing, the appeal is assumed to be directed to the ordinary tribunal of second instance.

The canon makes no provision, however, for an appeal to a tribunal of third instance which canon law admits, in general, against judgments of the second instance that have not become adjudged matters, if they are not consistent with the judgment of the preceding instance. For the third instance, the Roman Rota has general competence (it can be appealed to from any other court of appeal). However, at times, by virtue of special pontifical concessions, other tribunals also have competence (such as, for example, the Rota of the Apostolic Nunciature in Spain, the Tribunal of the Primate of Hungary, the Tribunal of Warsaw and of Gniezno in Poland). If

the appellant does not indicate the tribunal which he or she is addressing, the competence of these latter tribunals should be assumed, by analogy with the norm regulating the appeal at the second instance (which expresses a preference for local tribunals that are closer to the litigating parties), as well as by virtue of the principle that special legislative discipline prevails over general discipline.

When there is more than one party having a right to appeal, it is possible for the appeal to be lodged simultaneously with two different tribunals, the ordinary court of appeals and the Roman Rota. In this case, the competence of the higher court prevails, that is, that of the Roman Rota, because it is a tribunal of the Holy See and therefore is situated at a higher level than any other tribunal in the hierarchical organization of the Church. The competence of the Roman Rota must be considered absolute. If the lower court also proceeded with the case, the judgment pronounced thereby would be affected with the defect of irremediable nullity as provided in c. 1620 § 1.[1]

However, the canon reserves the criterion of prevention established by c. 1415, by virtue of which the tribunal that has first cited the respondent has the right the try the case. This criterion can only take effect if the lower court has served the citation before the appeal has been lodged with the higher court (were it otherwise, the rule that, as a general guideline, establishes the competence of this latter court would be useless). Therefore, given the strict limits established for lodging an appeal and the need, as we shall soon see, to pursue it, the prevention criterion can only function in matrimonial cases, in which the terms for appeal are not considered peremptory. Finally, let us add that the rule of precedence for the higher court is only valid when the tribunals with which the appeal is lodged are equally competent. When one of them is not competent regarding of the norms regulating the judicial system, the cause must of necessity be kept by the other court, even if it is of a lower grade (for example, an appeal to the tribunal of the Metropolitan, if this court is the first tribunal competent for the case, prevails over an appeal lodged with a tribunal established by the Bishops' Conference).

The criterion of prevention can also serve to confirm the principle that an incidental appeal (cf. c. 1637 § 3) must be lodged before the same judge who has taken charge of the principal appeal, and it cannot result in a transfer of the cause from the ordinary tribunal of appeals to the apostolic tribunal of the Roman Rota. In fact, an incidental appeal is usually lodged after the party has received notice of the principal appeal (*vide* commentary on c. 1637), and therefore after the tribunal has carried out the act (the judicial citation) that puts the rule of prevention into effect in its favor.

1. In this sense, cf. c. RAGNI, September 20, 1990, in *Il Diritto ecclesiastico* 102, II (1991), pp. 192ff.

1633 Appellatio prosequenda est coram iudice ad quem dirigitur intra mensem ab eius interpositione, nisi iudex a quo longius tempus ad eam prosequendam parti praestituerit.

The appeal is to be pursued before the appeal judge within one month of its being forwarded, unless the originating judge allows the party a longer time to pursue it.

SOURCES: c. 1883; NSRR 156 § 1; PrM 215 § 1; SN can. 409

CROSS REFERENCES: c. 1465 § 3

COMMENTARY

Paolo Moneta

The intent to appeal, first expressed in the act of appeal submitted to the judge who has pronounced the judgment (judge *a quo*), must be then confirmed with another formal declaration of the *pursuit* of the appeal, which must in turn be submitted to the judge who is competent for this subsequent phase of the process (judge *ad quem*). Given the short terms established for the first statement, it is in fact advisable for the party, after a period of reflection, to confirm and specify his or her intent to appeal before the new judge. This second statement is also subject to a peremptory term of expiration, one month, counted from the lodging of the appeal. However, the judge who has pronounced the judgment can establish a longer term in order to avoid running the risk of prejudicing the right to appeal due to practical difficulties. But the judge must take care to also avoid unduly prolonging the dispute (c. 1465 § 3). An extension of the time limit may be provided, for example, when the see of the court of appeals is far away and not easily accessible to the party. However, it should be taken into account that the act of pursuit is considered lodged in a timely manner provided that it is *transmitted* within the established time limit, regardless of the day it arrives at the tribunal.[1] This time limit is not considered peremptory for matrimonial cases or, more generally, for cases on the status of persons, similar to the term provided, as we have already seen, for lodging the appeal.

1. I.M. PINNA, *Praxis iudicialis canonica*, 2nd ed. (Rome 1966), pp. 147–148.

1634 **§ 1. Ad prosequendam appellationem requiritur et sufficit ut pars ministerium invocet iudicis superioris ad impugnatae sententiae emendationem, adiuncto exemplari huius sententiae et indicatis appellationis rationibus.**

§ 2. Quod si pars exemplar impugnatae sententiae intra utile tempus a tribunali a quo obtinere nequeat, interim termini non decurrunt, et impedimentum significandum est iudici appellationis, qui iudicem a quo praecepto obstringat officio suo quam primum satisfaciendi.

§ 3. Interea iudex a quo debet acta ad normam can. 1474 iudici appellationis transmittere.

§ 1. To pursue the appeal, it is required and is sufficient that the party request the assistance of the higher judge to amend the judgement which is challenged, enclosing a copy of the judgement and indicating the reasons for the appeal.

§ 2. If the party is unable to obtain a copy of the appealed judgement from the originating tribunal within the canonical time-limit, this time-limit is in the meantime suspended. The problem is to be made known to the appeal judge, who is to oblige the originating judge by precept to fulfil his duty as soon as possible.

§ 3. In the meantime, the originating judge must forward the acts to the appeal court in accordance with can. 1474.

SOURCES: § 1: c. 1884 § 1; NSRR 157; PrM 215 § 1; SN can. 410 § 1
§ 2: cc. 1884 § 2; PrM 215 § 2; SN can. 410 § 2
§ 3: c. 1890; CI Resp., 31 ian. 1942 (AAS 34 [1942] 50); SN can. 416

CROSS REFERENCES: cc. 1474, 1615, 1636 § 2

COMMENTARY

Paolo Moneta

The purpose of the declaration to pursue the appeal is to confirm and specify the preceding express declaration of challenge made in the act of appeal. It is not subject to special formalities. It only needs to consist of a request made to the higher judge to amend the judgment, with an indication of the reasons on which this request is based. As the appeal is not dependent on any specific defects in the judgment, the reasons do not need to be expressed analytically. It is sufficient that they refer to a generic injustice in the judgment. If the party does not seek to appeal the judgment

as a whole (as would be presumed in the absence of other indications, pursuant to c. 1637 § 4), the act of pursuit may also specify further and clarify the parts or the provisions of the judgment intended to be submitted to review by the higher judge.

The act of pursuit of the appeal must set forth the mandate by which the procurator or the advocate is appointed, unless the preceding mandate has not been expressly conferred for subsequent instances of the process (and unless the party, in causes in which it is allowed) is not personally a part of the process. It must also include a certified copy of the judgment being challenged. As the time limit for appeal runs from the notification of publication of the judgment (which publication takes place with the delivery or sending of a copy of the judgment to the parties or to their procurators, pursuant to c. 1615), the appellant should already be in possession of this copy and should have no difficulty in submitting it. In addition, the same canon under discussion also provides that the judge who pronounced the judgment must send to the court of appeal (in the period between the lodging and the pursuit of the appeal) a copy, duly authenticated by a notary, of the acts of the cause. These acts must include the conclusive act of the process, that is, the judgment. Therefore, for this purpose, the higher judge should also be in possession of the judgment in due time. Nonetheless, the legislator, in order to thwart any lack of meticulousness or diligence on the part of ecclesiastical judges, has tried to expressly foresee the situation in which a party does not expediently receive a copy of the judgment being challenged. In order to prevent this eventuality from prejudging the normal right to appeal, the canon provides that in the interval ("interim," as it apparently should be understood, between the formal petition submitted to the tribunal and the day in which it decides to issue a copy of the judgment), the time limit does not run, and the appeals judge (who should be informed of the irregularity), by formal order, forces the previous judge to comply as soon as possible with his official duty.

In the case of an appeal lodged by the promoter of justice or the defender of the bond, the law does not specify if the pursuit must be carried out by the one acting before the judge *a quo* (that is, the one who has lodged the appeal) or the one acting before the appeals judge. Inasmuch as this latter must participate in the appeals proceedings and follow its progress (with the faculty to renounce it at any time, pursuant to c. 1636 § 2), it is advisable for him to assess from the beginning the actual existence of reasons of public interest justifying the decision to challenge the judgment received by his colleague in the preceding instance. Therefore, it seems preferable to consider that the bodies that must submit the act of pursuit are the promoter of justice and the defender of the bond who act before the court of appeals,[1] although valid presentation of that act by the preceding public defender should not be prevented.

1. Cf. F. ROBERTI, *De processibus*, II (Rome 1926), p. 198.

1635 **Inutiliter elapsis fatalibus appellatoriis sive coram iudice a quo sive coram iudice ad quem, deserta censetur appellatio.**

The appeal is considered to be abandoned if the time-limits for an appeal before either the originating judge or the appeal judge have expired without action being taken.

SOURCES: c. 1886; NSRR 156 § 2; SN can. 412

CROSS REFERENCES: cc. 1630 § 1, 1633

COMMENTARY

Paolo Moneta

Acknowledgment of the right to appeal must not lead one to forget that there is also another contrasting right. This is the right to obtain a resolution of the dispute as quickly as possible, thereby preventing challenges from becoming a means of cunningly delaying this resolution or leaving it pending for an indefinite time. Therefore, the appeal is subject to compliance with specific requirements, within time limits that are also specific. Were these requirements not met, the right to appeal would lapse or, as the legislator has described it, the party must be deemed to have intended to waive this right (without the possibility of evidence to the contrary).

1636 **§ 1. Appellans potest appellationi renuntiare cum effectibus, de quibus in can. 1525.**

§ 2. Si appellatio proposita sit a vinculi defensore vel a promotore iustitiae, renuntiatio fieri potest, nisi lex aliter caveat, a vinculi defensore vel promotore iustitiae tribunalis appellationis

§ 1. The appellant can renounce the appeal, with the effects mentioned in can. 1525.

§ 2. Unless the law provides otherwise, an appeal made by the defender of the bond or the promotor of justice, can be renounced by the defender of the bond or the promotor of justice of the appeal tribunal.

SOURCES: c. 1889,9°; PrM 41 § 4, 221 §§ 2 et 3; SN can. 404,9°; CM IX § 2; SA Decissio, 16 nov. 1971

CROSS REFERENCES: cc. 1520–1525, 1637 § 3, 1641,3°, 1724

COMMENTARY

Paolo Moneta

Just as asking a higher judge to amend a judgment constitutes a faculty of the party, the party may also at any time renounce this petition, renouncing the appeal already lodged. According to general rules (c. 1524), in order to be valid, the renunciation must be made in writing and signed by the party or by the procurator who was given a special mandate. It must be communicated to the party or accepted thereby, or at least not challenged. Last, it must be admitted by the judge.

A renunciation of an appeal, as occurs for any other renunciation of an instance or acts of the process, has the same effects as expiration and obliges the renouncing party to pay the expenses of the acts he or she has renounced (c. 1525). In general, expiry, as specified in c. 1522, extinguishes the acts of the process but not the acts of the cause, which can take effect in a subsequent instance between the same parties on the same object. In the case of an appeal, however, there is a more radical termination because the expiry (and in the same way the renunciation) entails a lapse of the appeal and the resulting conversion of the judgment into an adjudged matter (as expressly indicated in c. 1641, 3°). Therefore, acts performed previously may no longer be used again, and the dispute is definitively terminated. Lastly, let us bear in mind that in appellate proceedings, as in the first instance, expiry occurs (unless otherwise provided in

particular law) when the parties have not performed any procedural act for six months without any legitimate impediment (c. 1520).

Getting back to the renunciation, it should be specified that acceptance by the other party can be considered a necessary requirement only if the other party has in turn submitted an incidental appeal (c. 1637 § 3), thereby demonstrating that he or she is also interested in amending the previous judgment. If this party has completely won in the first instance, there can be no reason to lodge an appeal and object to the renunciation of the appellant, unless to obtain payment of court costs. Once satisfied on this point, he or she can no longer prevent expiry of the appeal and prevent the previous judgment from becoming an adjudged matter. With respect to the judge, he certainly has no discretion in admitting the renunciation of the appeal, but must only certify its existence and declare expiry of the instance, —if the aforementioned presuppositions are present.

In the event of an appeal lodged by a public party, the canon under discussion foresees that the renunciation may be given (*fieri potest*) by the promoter of justice or by the defender of the bond of the court of appeal. If we wish to be more precise, he who looks after the *bonum publicum* before the judge *a quo* may only renounce the appeal lodged by him until the appeal has been pursued before the judge *ad quem*. Once it has been pursued (with regard to which the competency of the preceding public defender could not be excluded, *vide* commentary on c. 1633) the appeal judges completely takes over the handling of the case, and in turn all those who act before him. Therefore, only the promoter of justice or the defender of the bond of the court of appeals (not those of the prior court, which no longer has jurisdiction over the case) can renounce the challenge, with all the resulting effects, including the passing of the judgment into an adjudged matter.

The faculty to renounce on the part of the public defender before the court of appeals could be excluded by an express legislative provision (“*nisi lex aliter caveat*”). However, the *CIC* does not have any other provision to this effect, nor does the issue seem to lend itself to regulations by particular law. The only mention of a limitation on the faculty to renounce is found in the penal process, in which the promoter of justice may renounce the instance only by mandate or with the consent of the Ordinary who has decided to initiate the process (c. 1724).

1637 **§ 1. Appellatio facta ab actore prodest etiam convento, et vicissim.**

§ 2. Si plures sunt conventi vel actores et ab uno vel contra unum tantum ex ipsis sententia impugnetur, impugnatio censetur ab omnibus et contra omnes facta, quoties res petita est individua aut obligatio solidalis.

§ 3. Si interponatur ab una parte super aliquo sententiae capite, pars adversa, etsi fatalia appellationis fuerint transacta, potest super aliis capitibus incidenter appellare intra terminum peremptorium quindecim dierum a die, quo ipsi appellatio principalis notificata est.

§ 4. Nisi aliud constet, appellatio praesumitur facta contra omnia sententiae capita.

§ 1. An appeal made by the plaintiff benefits also the respondent, and vice versa.

§ 2. If there are several respondents or plaintiffs, and the judgement is challenged by or against only one of them, the challenge is considered to be made by all and against all whenever the thing requested is indivisible or the obligation is a joint one.

§ 3. If one party challenges a judgement in regard to one ground, the other party can appeal incidentally on the other grounds, even if the canonical time-limit for the appeal has expired. This incidental case is to be appealed within a peremptory time-limit of fifteen days from the day of notification of the principal appeal.

§ 4. Unless it is established otherwise, an appeal is presumed to be against all the grounds of the judgement.

SOURCES: § 1: c. 1887 § 1; PrM 212 § 3; SN can. 413 § 1
§ 2: c. 1888; SN can. 414
§ 3: c. 1887 § 2; NSRR 161
§ 4: c. 1887 § 3; SN can. 413 § 3

CROSS REFERENCES: cc. 1524, 1640

COMMENTARY

Paolo Moneta

The appeal has the effect of causing a review of the judgment and of leading to the pronouncement of a new judgment that fully replaces the previous one, correcting any injustice it may have incurred. The appeal

therefore affects the resolution of the dispute as a whole, involving all the subjects participating therein. Thus we arrive at some of the principles that are set forth in the canon in question.

Above all, the principle is that the appeal lodged by the plaintiff also benefits the respondent, and vice versa. This principle has no purpose when a party has fully prevailed over the other and only wishes to have the appealed judgment upheld. But it can operate in cases intended to clarify a juridical situation in dispute, such as for example cases of nullity of marriage. In that case, even if the parties continue to hold the formal position of petitioner and respondent in the process, as opposing parties, they can converge toward the same substantial position (e.g., in favor of nullity of marriage). An appeal lodged by one of the parties will then benefit the other, not only because this party can also benefit from a possible new decision that is in accord with his or her wishes, but also because he or she may continue to pursue the case until the judgment ifthere is a renunciation by the appellant.

The appeal can also be useful to the other party when this party has not been totally victorious in the previous instance, but has also been prejudiced in some way by the judgment. In this case, the appellant (if he or she has not succumbed altogether) will request that the judgment be revised only with respect to those provisions that are not in his or her favor. The other party, who has not lodged the appeal on his or her own (as he or she could have done), will benefit from the appeal that has been lodged, provided that he or she in turn lodges an incidental appeal. That is, provided that a formal statement of an appeal is lodged in which the provisions of the judgment to be changed are determined.

An incidental appeal can be lodged outside of the time limit established in general for appeals. It is sufficient for it to be lodged within fifteen days of the date the party is notified of the principal appeal. (With respect to time requirements and the method for notification, *vide* commentary on c. 1640). The interest in the incidental appeal only arises, in fact, after a party becomes aware of the principal appeal lodged by the other party. If lodged after the normal peremptory time limit for an appeal has lapsed, the incidental appeal expires if, for any reason (because it was lodged late, by an incompetent person, etc.), the principal appeal expires. In the event, however, of a renunciation of this latter appeal, the incidental appellant has the right to reject it (*vide* commentary on c. 1636) and to pursue the process in order to obtain any fully favorable judgment.

The unitary principal of the appeal is also valid when there is a situation of joinder of the issues, that is, when there is more than one subject in the position of the petitioner or of the respondent. In this case, an appeal by just one of the subjects is sufficient to include all the others who are in the same position in the process. And, conversely, an appeal intended for one of the defendants is sufficient for the others to also be involved therein. For this effect to operate, it is nonetheless necessary, as the

canon provides, for the object of the judicial petition to be united with respect to those who present it (e.g., the common ownership of an asset), or for the obligation the compliance of which is being sought to be joint, indivisible among the various persons bound thereby, in which each one of them must be responsible for the entire obligation.

Last, the nature of a general, undetermined challenge characteristic of the appeal entails the presumption that it covers the judgment as a whole, causing an overall review of the judgment. If the party does not intend to challenge the judgment as a whole, he or she must specify which provisions of the judgment he or she wishes to submit to appeal. This specification could have already been set forth in the act of appeal, but it must be definitively confirmed in the act of pursuit, in which the reasons on which the appeal is based, are indicated with more specificity (c. 1634). It should be borne in mind that in the act of pursuit it is possible to more completely delimit the scope of the judgment one intends to submit to review, but not broaden it with respect to the way it has been established in the act of lodging the appeal. If this last act, albeit formulated generically, is intended for certain grounds of the judgment, at the time of its pursuit, its scope may not be extended in the pursuit to other grounds that were not previously challenged.

1638 **Appellatio exsecutionem sententiae suspendit.**

An appeal suspends the execution of the judgement.

SOURCES: c. 1889 § 2; SN can. 415 § 2

CROSS REFERENCES: cc. 1643, 1644, 1650

COMMENTARY

Paolo Moneta

The nature of the ordinary means of challenge, a characteristic of the appeal, and the fact that it can be exercised, in general, against any judgment believed to be unjust, suspends the effects of the judgment under appeal. The appellate process, in substance, constitutes a natural continuation of the preceding trial, with the consequent referral of a definitive resolution of the dispute to the conclusion of that process. Only at that time, once the judgment is pronounced at the appellate stage, will the said decision have its legal effects. The suspensive effect of the appeal must be related to the principle linking the efficacy of the judgment with its becoming an adjudged matter (c. 1650; and for the special system established in this regard for causes on the status of persons, cc. 1643–1644). A judicial pronouncement will only have full force and effect when it acquires this character of the definitive application of law to the specific case.

The normal suspensive effect of an appeal may nonetheless suffer exceptions. The first judge, as well as the one who hears the appeal, may order, even ex officio, a provisional execution of the judgment in some cases (for urgent reasons justifying it or when provisions or payments have been ordered for the needed support of a person, c. 1650 § 2). But in this case the appeals judge also reserves the authority to suspend execution if he confirms that the challenge is well-founded and that execution could cause irreparable damage (c. 1650 § 3).

1639 **§ 1. Salvo praescripto can. 1683, in gradu appellationis non potest admitti nova petendi causa, ne per modum quidem utilis cumulationis; ideoque litis contestatio in eo tantum versari potest, ut prior sententia vel confirmetur vel reformetur sive ex toto sive ex parte.**

§ 2. Novae autem probationes admittuntur tantum ad normam can. 1600.

§ 1. Without prejudice to the provision of can. 1683, a new ground cannot be introduced at the appeal grade, not even by way of the useful accumulation of grounds. So the joinder of the issue can concern itself only with the confirmation or the reform of the first judgement, either in part or in whole.

§ 2. New proofs are admitted only in accordance with can. 1600.

SOURCES: § 1: c. 1891 § 1; PrM 219 § 1; SN can. 417 § 1
§ 2: c. 1891 § 2; NSRR 160 § 1

CROSS REFERENCES: cc. 1600, 1683

COMMENTARY

Paolo Moneta

The process for which the appeals judge is authorized cannot cover a broader scope than that handled by the preceding judge. In fact, the task of the appeals judge is only to *review* the pronouncement of the previous judge, thus hearing the same type of trial over again in order to eliminate possible errors or injustices. If he were allowed to examine new petitions, the order of the trial would be altered and the right to entrust to the consideration of a higher judge any issue submitted to trial the first time would be compromised. In this appeals phase, new petitions cannot therefore be introduced that were not handled in the preceding instance. There are three elements identifying a petition, according to common doctrine: the parties, a request made to the judge (*petitum*), and the grounds on which said request is based (*causa petendi*). These three elements must remain unchanged in the appellate proceedings, and therefore petitions that are different than the previous ones, even in just one of those elements, cannot be introduced. In fact, the canon only makes express reference to one of these elements, the *causa petendi*. This is due to the fact that an exception for matrimonial cases is only provided for this element,

and because problems or uncertainties can arise regarding this element more than the others. But there is no doubt (as for the rest, traditional doctrine has always been considered),[1] that, more generally, any petition that is new under any of the aforementioned elements is precluded.

The introduction of new petitions is not even allowed *per modum utilis cumulationis*, that is, presenting a new additional *causa petendi* related to the grounds of the preceding petition. Thus, the object of the dispute argued in the appeal, which must have been specified already in the joinder, can refer only to a confirmation, or full or partial modification of, the preceding judgment.

The prohibition on introducing new petitions at the appeals stage does not apply for matrimonial cases, by express legislative provisions ("salvo praescripto," c. 1683). In these cases, the court of appeals may admit a new ground for nullity, that is, a petition based on a new *causa petendi*, and rule on it as if it were in the first instance (with the corresponding ability to appeal on this ground to the higher competent judge of the second instance).

There do not, however, seem to be any valid reasons for imposing on the appeals judge the requirement that he handle the case on the basis of the same arguments presented to the first judge. The objective of this appellate proceeding is to ensure a higher degree of justice, and this objective can doubtless be achieved more suitably if the new judge has at his disposal more elements capable of helping him in the search for the truth, and in an understanding of the concrete reality of the dispute. Therefore, in the appellate proceedings, new evidence can be presented, either at the request of a party or *ex officio*, according to general rules. However, in order to avoid abuses or dilatory tactics, the admission of new evidence at the appellate stage has some limits. These are the same limits that are established at the first instance of the case when there is an attempt to present more evidence after the issuance of the conclusive decree of the cause (c. 1600).

1. Cf. M. LEGA-V. BARTOCCETTI, *Commentarius in iudicia ecclesiastica*, II (Rome 1950), p. 1009; F. DELLA ROCCA, *Istituzioni di diritto processuale canonico* (Turin 1946), p. 340.

1640 **In gradu appellationis eodem modo, quo in prima instantia, congrua congruis referendo, procedendum est; sed, nisi forte complendae sint probationes, statim post litem ad normam can. 1513 § 1 et can. 1639 § 1 contestatam, ad causae discussionem deveniatur et ad sententiam.**

With the appropriate adjustments, the procedure at the appeal grade is to be the same as in first instance. Unless the proofs are to be supplemented, however, once the issue has been joined in accordance with cann. 1513 § 1 and 1639 § 1, the judges are to proceed immediately to the discussion of the case and the judgement.

SOURCES: c. 1595; NSRR 163; PrM 213; SN can. 417 § 1; CPEN Rescr., 28 apr. 1970, 23 § 1

CROSS REFERENCES: cc. 1501–1618, 1639, 1682

COMMENTARY

Paolo Moneta

In appellate proceedings, the same procedural rules must be followed as those established for proceedings of the first instance, with appropriate adjustments (*congrua congruis referendo*). Therefore, once the pursuit of the appeal is presented, which can be incorporated into the petition due to its function of assigning a judge to the case, the judge must confirm its admissibility and immediately order that notice of the citation decree be served on the other party, affirming the act of pursuit of the appeal. From the day of the notice (which officially makes the other party aware of the appeal and the specific parts of the judgment on which it is lodged), the terms for a possible filing an incidental appeal begin to run (c. 1637 § 3). The citation decree will be followed by the joinder of the issues, which includes the formulation of the doubt which the judgment should resolve. If the evidence set forth in the previous instance must be completed, the judge will order initiation of the instruction of the case according to general rules. If it is complete, he must proceed immediately to a discussion of the cause (setting for the parties the terms for presentation of their respective arguments) and then, immediately to the judgment. This last express legislative provision, (superfluous in itself, because it can be inferred from general procedural discipline), no doubt is made to stress the need for the appellate process to proceed as quickly as possible, avoiding the risk that it may be used not to guarantee higher justice, but to delay or hinder its being carried out.

It should be kept in mind that a unique procedure is provided for appellate proceedings after a judgment of nullity of marriage is pronounced at the first instance (c. 1682). But in this case, more than an appeal in that sense (because, in fact, it is not initiated by the challenge of one of the parties, but *ex officio*), it is a review of the previous process imposed by law as a condition for the judgment of nullity to have juridical effects.

TITULUS IX
De re iudicata et de restitutione in integrum

TITLE IX
The Adjudged Matter and Full Reinstatement

INTRODUCTION

Carmelo de Diego-Lora

I. Preface

What first surprises the writer of this commentary is the joint exposition by the *CIC* under the same heading, in an attempt to unify the title, of two procedural principles as different as the adjudged matter and total reinstatement. Adopting this organizational position is not an innovation, given that the *CIC*/1917 has done so before (cf. Book IV, pt I, sec. I, tit. XV), uniting in the procedural system what is not only discordant, but also contradictory. This organization is even more surprising when, immediately before, in title VIII, the recourses of the plaint of nullity and the appeal are regulated under the common heading *De impugnatione sententiae*, dispensing with total reinstatement, as if this recourse were not also a challenge of the judgment. *Adversus sententiam* are exactly the first words of c. 1645 § 1, the first canon discussing reinstatement.

One might wonder about the reason for this seemingly close relationship between the adjudged matter and total reinstatement. It seems that only adjudged matter itself justifies it: that is, the uniqueness of a recourse by which the judgment is challenged *quae transierit in rem iudicatam*. However, what is being challenged is not the effect of the judgment, the *res iudicata*. What is really being challenged is only the judgment, although its effect has become an adjudged matter effect. The judge or tribunal will not be able to make any pronouncement regarding the effects of the adjudged matter until reinstatement has been granted through a pronouncement rescinding in full the challenged judgment (c. 1648). From another point of view, it is worth noting that the five reasons of c. 1645 § 2 for establishing reinstatement directly refer to the judgment against which one is making recourse.

Canon 1905 § 1 *CIC*/1917 attempted to separate total reinstatement from the appeal and from the plaint of nullity, assigning the phrase "special remedy" to reinstatement and the phrase "ordinary remedies" to the other two recourses.

In the new Code, with technical aptness, the term *remedium* disappears. The term *impugnatio*, however, covers those two traditional ordinary canonical recourses against judgments. In our opinion, there was nothing to prevent the term "challenge" from being used as a heading for *in integrum*, without thereby distorting the nature of this recourse.

However, we believe that this plural heading does not in fact involve a purely systematic issue, but, on the contrary, is a manifestation of the existence of an extremely profound canonical procedural doctrine, on which this writer has previously had the opportunity to state his opinion.[1] This issue is that the *CIC* has a very weak canonical procedural understanding of the adjudged matter. It considers it more from its potential instability, and from the hypothetical loss of its effects, than from the point of view of the efficacy that is inseparably linked to its concept. This is shown in the organization of the *CIC*, and more so in cc. 1643 and 1644, included in the chapter *De re iudicata*. Our position has always tended to demonstrate that an acknowledgment of the adjudged matter occurs in the canonical procedural system, as in so may other juridical systems, without prejudice to the efficacy of the adjudged matter (which undoubtedly appears in the canonical system with its own peculiarities), being subject to possible limitations.

II. THE ADJUDGED MATTER

1. When procedural law uses the terms *adjudged matter*, it is referring to the last, terminal, effect of the process, proceeding from the closed judgment, that is, from that definitive judgment that ends the hearing of the principal case (c. 1607).

Closed judgment should be understood, with common doctrine, as the judgment that allows no recourse through the ordinary channels. In the canonical procedural system, that ordinary channel is really the appeal (cc. 1628 ff). If the plaint of nullity is also usually included as an ordinary recourse, this term is only accurate when the plaint is lodged together with the appeal, within the term established for the appeal (c. 1625). A plaint of nullity filed outside of such term, granted by cc. 1621 and 1623, according to whether it is remediable or irremediable nullity, is

1. C. DE DIEGO-LORA, "Del pasado al futuro de la 'res iudicata' en el proceso canónico," in *Ius Canonicum* 13 (1973), pp. 193–235; "Eficacia de la cosa juzgada y nueva 'propositio'," in *Cuestiones Básicas de Derecho Procesal Canónico* (Salamanca 1993), pp. 179–211.

not objecting to the finality of the judgment. Its objective still points, rather, albeit indirectly, to the adjudged matter, although it directly uses the specific challenge of nullity of the judgment.

2. The procedural effect of the definitive judgment, which acquired finality because it could no longer give rise to any ordinary recourse of appeal against it, is called the *formal adjudged matter*. This effect fully occurs in the canonical procedural system, as clearly provided in cc. 1641 and 1642 § 1.

Together with the effect of the formal adjudged matter, so expressly set forth in the *CIC*, although its canons do not use the term *formal*, there is another dimension to that effect of adjudged matter, which is also expressly recognized in another codal norm, that of c. 1642 § 2.

The pronouncement of that judgment, in the first place, is law for all the parties and generates, from a certain perspective, the *actio iudicati*, and, from another point of view, the so-called *adjudged matter exception*. This dimension, which refers not to the efficacy of the judicial pronouncement itself, *but to what is pronounced* in the judgment, is what we describe with the terms "*material adjudged matter*." When commenting on these canons, there will be an attempt to outline all the phenomena that are covered under this terminology. We will now attempt to, once again, maintain that, in view of cc. 1641 and 1642, the canonical procedural system includes the formal adjudged matter as well as the material adjudged matter of the definitive judgment that has acquired finality.

However, just as the formal adjudged matter is exhausted in the process itself, the material adjudged matter goes beyond the process to the world of material juridical relationships, with the consequent conditions for those who were party to the process, and for their successors. It also binds the judges themselves to any future event for which there is an attempt in some way to reproduce or reinstate, as a new procedural issue, what was decided irrevocably by the definitive judgment that acquired finality. This judgment, in the content of its pronouncements, (be they purely declarative, be they constitutive of new juridical situations, creating, modifying, or extinguishing those existing before, be they penalties, if they impose obligations to be fulfilled by the losing party in the case), gives rise to consolidated juridical situations that tend to remain in that world of material-juridical reality which they affect.

The procedural juridical form is thus presented as the originating cause of new juridical phenomena. This is regardless of whether the juridical material that was subjected to the process actually could would have possessed a substantial reality other than that resulting as a consequence of the procedural treatment that already concluded.

Herein lies the shaping force of the juridical-material realities at times possessed by law regulating the juridical forms and, specifically, in the juridical area under discussion, formal procedural law.

III. Risks to Which the Adjudged Matter Is Exposed

1. As a consequence of those effects of the material adjudged matter, both juridically binding and irrevocable, the adjudged matter can be considered, within the context of a given juridical system, the creator of a *formal truth* that can even be given preference over the *material truth* itself. This is so if the last pronouncements reached in the process, and expressed by the closed definitive judgment, erroneously suffer from a lack of adaptation to that truth to which the judgment must be completely faithful. And that occurs because the content of the judgment becomes law for the parties and the judge (c. 1642 § 2), without it being necessary to call on, as did c. 1904 § 1 *CIC*/1917, the presumption *iuris et de iure*, because the legal effect of the adjudged matter is stronger when it is considered as a material adjudged matter.

This possible contradiction between the resulting formal truth and the material truth is still always a vital issue for procedural law, due to the risk of error that is constantly present in any human act, however well-intentioned and enlightened it may be when the judgment is formulated. As Della Rocca has indicated,[1] the process is the bridge between norms and life, and life flows through human acts, which are the raw material of every process. If it is necessary to depart from the purity of the means as guarantees of the truth of the end, given that judges cannot judge things just as they are, but in this sphere of procedural forms, they must do it with respect for the rules, states Capograssi,[2] without prejudice to the fact that justice may be in conflict with itself.

Law tries to mitigate that risk of error, a product of the knowledge acquired by the judge of the facts in dispute, not perceived other than indirectly through the evidence that is brought to the process (which are merely traces, vestiges of what occurred), to the extent that it is possible. Whereas this knowledge is perceived through objectivity and impartiality by which the judge must establish himself and act in the process, the adjudged matter is, however, subject to certain limits such as the eventualities foreseen by law, which justify the existence of certain extraordinary recourses, (such as a review of the cause in so many secular systems, or full reinstatement in the canonical system).

These recourses are usually allowed broad time periods for their exercise, although they must be also be limited to this timeliness for reasons of juridical security. At the same time, they are subject to limited enumerated causes that must also be revealed to the judge before the recourse is admitted, and for the purpose of avoiding uncertainty in the subjective rights and in the situations acquired as a result of the judgment, in this

1. Cf. F. DELLA ROCCA, *Appunti sul processo canonico* (Milan 1960), p. 29.
2. Cf. S. CAPOGRASSI, *Opera*, V (Milan 1950), pp. 66 and 67.

way limiting undue use of the right to take recourse. With this objective, it is provided that only well-founded and very just causes demanding reversal of a judgment can be alleged against an adjudged matter, for the purpose of keeping justice from being irrevocably violated. However, by extension, the ultimate result of the process is also protected, for stability of law and peace in juridical life.

2. The aforementioned fears regarding this possible incompatibility between the formal truth, a result of the closed definitive judgment, and the substantial truth is intensified in the canonical procedural system due to the moral reason that must support positive law on all occasions. There is tension in the canonical system, which has been avoided several times by the Roman Pontiffs, in their customary annual addresses to the members of the TRR. This is what occurred with Pius XII, in his famous speech of October 2, 1944, in which he emphasized the role of those who act in the process, with particular reference to the defender of the bond, in collaborating in the search for the objective truth on the existence of nullity of marriage in specific cases. John Paul II has repeated this doctrine in many speeches,[1] always deeming the administration of justice in the Church as *a service to the truth* entrusted to the judge. Therefore, when the judge forms the judgment and obtains moral certainty, he must bear in mind that, although there can be many errors, there is only one truth. This truth is the one that, in the opinion of the Pontiff, must always be present in all canonical processes, from the beginning to the judgment, as the basis, mother, and law of justice.

Precisely in order to reach this objective, adds the Pontiff, the Church has developed a procedure, in an attempt to reach an objective truth that ensures, both higher guarantees to persons when they are maintaining their own reasons, and, coherent respect for the truth established in the divine mandate regarding marriage, which allows, from the instruction itself, that all the acts of the process, from the libellus to the defense briefs, can and will truly be sources of the truth.

This concern for the substantial truth is still current, and this could be stated in contemplation of the spirit of so many procedural systems of various peoples, of secular law. In its codes the formal truth arising from the judgment is especially strengthened, due to reasons of juridical security and the protection of third parties, and in favor of the freedom of commerce and the efficacy of juridical activity. However, the similarities between the juridical systems are more complex due to the fact that in canon law that concern that the formal truth always correspond to the substantial truth acquires a greater reason for the demand when, in view of certain issues, especially in connection with canonical nullity of marriage,

1. Cf. JOHN PAUL II, especially in the Addresses to the TRR on February 4, 1980, in *AAS* 72 (1980), pp. 172–178; and on January 24, 1982, in *AAS* 73 (1982), pp. 228–234.

it is noted that an erroneous judgment can be the source of danger for the soul or place the sacrament in grave danger.

This concern is undoubtedly extremely important, and since the Decree of Gratian, it has brought with it its own set of problems, with quite varied manifestations that doctrine, as well as canonical legislation, have dealt with throughout the centuries.[1] Consequently, in canon law, the phrase attributed to Ulpian, *res iudicata pro veritate habetur*, is seen to be surrounded by conditions limiting the statement and is involved in a certain distrust, about which we could state, using the words of García Faílde, that in canon law, regarding the judgment, it is "as if by a demand of the juridical system, substance prevails over form."[2]

"If the judgment is accurate—according to Arregui—all the weight of the social power of the Church is oriented towards reaffirmation and maintenance of the order desired by its Founder. If, on the other hand, the decision is erroneous, it is an attack on the divine authority, in an attempt to give precedence over the juridical situation invested with sacramentality to another diametrically opposed situation."[3] It then gives rise to, the author goes on to say, an "unyielding conflict with divine Law by the judge (*ratio sacramenti*) and the beginning of a source of sin, *actus ex quo peccatum consurgit* according to Sanchez, for the parties (*ratio peccati*)." However, he concludes that "in view of the continuing possibility of a judicial error, bearing in mind the impossibility of constitutional order provided to endorse, in favor of juridical security, fallible judgments discussing material taken from the free interplay of positive Law," even if the immutability of judgments of the nullity of marriage is denied, nonetheless, "for reasons of prudence, the double judgment acquires a certain finality because it may only be challenged based on new and grave arguments or documents (c. 1903) and it is executory (c. 1987)."[4]

In a juridical system, like the canonical one, dominated by the idea of realization of moral imperatives, the ultimate and constant objective of which is to always comply with the supreme law of the Church, and the salvation of souls, it should come as no surprise, as indicated by Della Rocca,[5] that the risk of injustice of the judgment occurs with a particular dramatic quality. This in turn explains the torment to which the legislator and the interpreter in canon law are subjected in defending the supreme demand for justice on earth to the extent that it is possible.

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1. Cf. L. MUSELLI, *Il concetto di giudicato nelle fonti storiche del Diritto Canonico* (Padova 1972).
2. J.J. GARCÍA FAÍLDE, *Nuevo Derecho Procesal Canónico* (Salamanca 1984), p. 154.
3. A. ARREGUI, "Sobre la cosa juzgada en las causas matrimoniales," in *Ius Canonicum* 4 (1964), pp. 579–580.
4. Cf. A. ARREGUI, "Sobre la cosa juzgada...," cit., p. 581.
5. Cf. F. DELLA ROCCA, *Appunti...*, cit., p. 139.

3. Thus, in order to duly consider this issue, we must not forget that procedural law, with its norms, directly tends to provide practical solutions of justice to society, and that, at the same time, it is formal law. Therefore, there will always be a fear that in the realm of procedural forms, in spite of prevailing normative stringency, justice may be smothered, while it is justice that compliance with said norms seeks to achieve. It is possible that the material juridical world has not been faithfully expressed in the process. This discord can occur to the extent that procedural form is used as an instrument defining material rights, be they within the sphere of secular law or in canon law.

In light of that possibility, it will always be reasonable to wonder if an unjust result brought about by a judgment will always remain consolidated and immutable due to the effect of the adjudged matter. At the same time, we should wonder if it would be legitimate for juridical situations resulting from the judgment, often after a long process, (with all the guarantees of the dispute and of the respect for the principal of equality of parties before an independent judge), to always be in danger of uncertainty, maintained *sine die* in their insecurity, with prejudice to those who have been legally granted some rights in a noble and open dispute. Does the mere fear that, on some occasions, the result defined by the judgment has lacked the necessary correctness, justify the weakening of an entire juridical system conceived to guarantee the development of the juridical life of society in a period of just peace? Thus every procedural system that seeks to function will not fail to establish the binding force of its judgments that are no longer appealable.

The solution apparently offered by c. 1643 could be chosen. Excluding from the adjudged matter causes on the status of persons, and *a contrario sensu*, all definitive and final judgments of the remaining judicial causes must be understood to be subject to the adjudged matter effect. Moreover, let us not forget that there are other canonical judicial causes unlike those related to the status of persons, for which it would also be reasonable to give these judgments the same treatment of exclusion of the adjudged matter effects. This could occur in causes related to spiritual matters, in the same way as in any other cases that may contain an element of sin. If the claim arises duly formulated, in some cases the activity belonging to the judicial power of the Church is also exercised (c. 1401). No reason can be found to explain why some causes of such spiritual importance must be excluded from the provisions of c. 1643. It would seem fair if this procedural treatment were common at least to all causes in which that element of sin could be found, or, as stated in the former law, danger to the soul or danger to the sacrament.

We believe that the juridical treatment of issues of such importance must be uniform. However, it must be acknowledged that if certain procedural objects are subject in their regulations to divine law, it is also true that when they are subjected to the judgment of men, through the procedure, these men will assess with their own opinions the statements made

by other men in their respective written pleas and defenses, just as they will assess any evidence presented to them in order to issue the opinion formulated in the judgment with opinions that are also of men. However, certainly, said assessments will be adapted to rational criteria and will for this reason be no less human. These criteria will be used in the end in an attempt to apply and interpret the same divine law.

4. Adjusting to the demands imposed by the nature of things, canonical legislation, with all its potential risks entailed in human actions, has decided that it will be the judges, using the guarantees of the process in order to find out the substantial truth, who will judge said matters, so often dependent on causal human acts, which at the same time that they are evident to the senses as human acts, entail a sacred *quid*, which belongs to the realm of divine law. That legislative decision means that the judges must face the risks of possible human error.In the judgment that they must issue, they will use external information and phenomena, which are perceptible to the senses, in which they will set forth the consequences or results deduced therefrom, although they must always remain at the threshold of the mystery of what is divine in the object under examination, on which they must judge.

It is the existence and veracity of this information and these phenomena that must be proven. The understanding of man enjoys that necessary aptitude that allows him to rationally judge them with accuracy. Canonical legislation has had to trust that ability of the human creature to discern and deduce, on matters of such transcendence. It has also trusted the aptitude of the instrument to be used, the canonical process, surrounding it with guarantees for the truth to be reached with greater accuracy, and distancing it (always when humanly foreseeable), through rigorous procedural forms, from possible mistakes in the forming of an opinion and the issuing of the judgment.

Therefore, when a ruling given on the issue in dispute is solemnly pronounced through the judgment, the divine could be said to be judged with human rational criteria. It is, however, those optimal human criteria that offer the most assurance of accuracy, which is also corroborated by the last guarantee, which makes way for the adjudged matter, of the double approval of judicial resolutions. All human means used are legitimate, are supported by the authority and power of canonical law. These human means have come to demonstrate, moreover, the coherence also of value judgments and of their conclusions through a concordant formulation in both instances by the judges who are competent according to law, as well as endowed with technical-juridical titles characteristic of specialized human knowledge, which enable them to make assessments of the facts and of the applied law. These value judgments, these deductions, and the resulting *praesumptiones hominis*, that these judges have reached at different instances, in the end, form the basis for the unreformable final definitive judgment.

This explains the adjudged matter effect on the closed definitive judgment, and this is also what is contemplated in cc. 1641 and 1642 § 1. But this is also the efficacy of the material adjudged matter that all definitive judgments include according to c. 1642 § 2. That this is so is also confirmed by cc. 1684 and 1685, discussing the execution of judgments of nullity of marriage.

Then, in view of the perplexity we are offered against the aforementioned, we must ascertain the scope of the text of c. 1643, in the context of a long canonical tradition. In this case, the text itself is not sufficient. For a proper interpretation, we must turn to the context and other aids that are offered us by c. 17 for this purpose. As we analyze each of the canons in this title, it will become evident that c. 1643 does not contain a mandatory provision absolutely denying that the adjudged matter occurs in closed definitive judgments pronounced on causes on the status of persons, but it must be interpreted in the light of c. 1644. And in this latter canon, it is noted that that adjudged matter is not denied, but is subject to a limitation, which depends on a particular eventuality. If this occurs, it will leave the judgment without its characteristic effect of an adjudged matter, which, since it became closed, had already achieved this effect.

From another point of view, in like manner, every closed definitive judgment, except those pronounced on the status of persons, is subject to another limitation affecting it. If any of the events provided in c. 1645 occurs, the effects of the adjudged matter already achieved will be legitimately revoked.

In some cases, it is not necessary to understand that those judgments did not produce the *res iudicata* effect. Rather, it could be said that an adjudged matter has limitations that only the occurrence of certain future events may make clear. We will briefly refer to this shortly, and will set it forth in more detail in the commentaries to the respective canons.

IV. THE LIMITATIONS OF THE ADJUDGED MATTER

1. *The limitations coming from closed definitive judgments pronounced in causes on the status of persons*

a) Canon 1644 shows us the limitations that the adjudged matter can have on these processes. That is, it provides *a contrario sensu* those situations in which the adjudged matter exception cannot be made. On the other hand, cc. 1684 and 1685 provide those effects judgments of nullity of marriage that have obtained finality have and how they are executed.

Except in the factual supposition described therein, c. 1644 makes it legitimate for a closed judgment to be protected in the adjudged matter exception for the purposes of preventing a new questioning of what has

already been decided judicially with finality (*ne bis in idem*). This situation should not be confused with the raising, for example, of a plaint of nullity of marriage based on a new cause of action. According to c. 1641, 1°, the two judgments bring about the effects of an adjudged matter when the same parties are involved, the petition is the same, as well as the cause or causes of action. If this *causa petendi* is different in the new plaint of nullity, we have the presentation of a new case, different from the one that was resolved. Nullity of marriage can take place because of any of the various causes established by the legislator. Therefore, if the plaint of nullity is lodged because of more than one cause, the formulation of the doubts must specify the ground or grounds upon which its validity is being challenged (1677 § 3).

Laying aside the above, according to c. 1644, for a tribunal to admit this so-called *nova causae propositio*, challenging what has already been finally and definitively decided, the petition must set forth new elements or information, consisting of *new arguments and evidence*, which must also be *grave*, and be submitted before the court allows the proposition of the cause.

That is, it is new information and elements that were not before submitted in the process, outside thereof, on which the judicial judgment that acquired finality could not even be pronounced because it was unknown by the judicial body. They were not taken into consideration when the judgment was pronounced, nor could they have been, because they were unknown to the judge or tribunal. Therefore, it is new information and elements, completely outside the opinion formulated in the two similar judgments pronounced at different instances.

But, moreover, they must be *grave* such that they lead the body before which the new cause is lodged to reasonably fear that, if the judgment were developed taking into account said arguments, it probably would have influenced it to the extent of it being believed *prima facie*, presumably, that its pronouncements could have been different from those previously formulated.

b) In fact, the efficacy of the judgment, in these matters related to the status of persons, only reaches the judicial decision within the context of the process in which it was pronounced, taking into account the information and elements of the hearing and instruction that were offered and proven before the judicial body that pronounced said judgment. The adjudged matter effect does not only proceed from expediency, or from the fact that it is even understood to be necessary to protect juridical security. It must also be based on a reason derived from the sphere of juridical power in which the judge makes his pronouncement, as well as from the nature of the procedural instruments (arguments and evidence), used when judgment was pronounced. Thus, just any argument will not be sufficient, even if it is new, for the subsequent trial, it must be grave. It requires the presence of an event, which is set forth in the new argument or

evidence, duly contrasted by the judicial body before which the new proposal of the cause is presented, which brings about, *prima facie*, that presumption that the judgment would not have the same pronouncements if this new information were part of the knowledge that saidbody had when issuing the ruling contained in the judgment.

Therefore, the review of the judgment made in the *nova causae propositio* is not the effect of a second trial on what has already been judged, as a type of appeal, but rather the judgment is again subject to a higher court, for it to rule again on the true status of persons after comparing the new arguments and evidence with what was set forth in the previous process. If the logical results deduced therefrom coincide, it would not be possible to again rule on that status of persons subject to the process, which already was definitively and finally resolved. Therefore, it would only be upholding the correctness of the previous ruling. On the contrary, if they do not coincide, then a new ruling must be issued on what has already been judged, on that primary object of the process, in the light of new evidence that *prima facie* seems to have transcendental significance for the purposes of pronouncing on the specific case a future judgment from content that is potentially different from the previous content. In the new proposition of the cause, more than ruling on the definitive judgment that achieved finality, a new ruling is issued regarding the object of litigation on which the former ruling pronounced, but with new information allowing the formulation of a more complete and correct ruling, according to the substantial reality, which is now shown to the judge who has new sources of knowledge.

2. *The possible limitation proceeding from "restitutio in integrum"*

The heading of title IX, the subject of this commentary, discusses the *restitutio in integrum* along with the adjudged matter. As expressly indicated in c. 1645 § 1, this recourse is lodged against a judgment that has become an adjudged matter.[1] We will here limit ourselves to indicating that its regulation is set forth in cc. 1645 to 1648, and that terms of a not-very-long duration are provided for its exercise, even if they are considerably longer than those commonly provided for the appeal. They also provided that the competent judge, before ruling on the substance of the cause, must proceed to grant full reinstatement, and if it is not granted, his judgment will imply full acceptance of what was appealed. The specific commentary on the canons that regulate it (*vide* commentary on cc. 1645–1648) will provide complete information on this recourse, which c. 1905

1. Cf. C. DE DIEGO-LORA, "Control de la justicia de la sentencia firme y definitiva en el proceso canónico," in *Ius Canonicum* 29 (1989), especially pp. 285–304.

§ 1 *CIC*/1917 termed *remedium extraordinarium,* about which the current Code has chosen to remain silent.

If here we touch on this recourse somewhat more than, in general, what has just been indicated, it is basically because it is linked under the heading of tit. IX with the adjudged matter and because of its aforementioned consideration as a limit of the adjudged matter. It is a limit of the adjudged matter, in principle, of any definitive canonical judgment that has acquired finality, whether it was pronounced in the ordinary contentious process or in the oral contentious process.

In general procedural doctrine, it has also been called reinstatement *auxilium extraordinarium.* In fact, it has come to mean the result of a juridical figure of a material nature, characteristic of civil law: reinstatement for harm, being transplanted to the process, because it is a recourse. Thus the extraordinary character of the recourse when, because of the finality of the judgment, no ordinary recourse is admitted, as an ordinary appeal.

The causes for which this recourse can be lodged, beside a manifest injustice in the judgment, are enumerated in c. 1645 § 2. Unlike historical law, it is not reduced to a procedural remedy of juridical protection of minors who, during their minority, could be unjustly harmed by their legitimate representatives. Now it is a closed and definitive judgment that is deemed manifestly unjust for certain reasons, which are: dishonest conduct by the parties who falsified the reality by fraud or falsified evidence, or by providing documentary evidence that was also false, or because new documentary evidence has appeared subsequently. This is always based on the idea that if it had been discovered during the process, or if this information could have been contributed, the decision contained in the judgment would have other different pronouncements. It is also added to said causes that the judgment being challenged would have disregarded a not merely procedural legal provision, or contradicted what was previously decided, which would have caused the adjudged matter. With these reasons as the base suppositions, the objective of this recourse becomes evident, which was conceived in the ultimate and extraordinary search for the substantial truth.

The lodging of this recourse for any of these reasons determines the efficacy of the adjudged matter already acquired through the judgment, if it is also lodged within the terms provided by c. 1646. Acceptance by the judge or tribunal of the petition by which the recourse against the closed definitive judgment is lodged is already a challenge to the adjudged matter, which keeps the adjudged matter exception from being filed. Moreover, the mere exercise of the *actio iudicati* derived therefrom is not allowed, unless the judge suspects, with probable indications, an intent on the part of the appellant to delay the proceedings (c. 1647). By this we understand that the admission of the challenge petition characteristic of this recourse must be particularly handled by the judge or tribunal receiving it,

in order that the recourse does not become an instrument of injustice in the hands of litigants acting in bad faith.

Therefore, the admission of the petition must be decided in advance with strict criteria, in order to avoid imaginary or fraudulent claims. We also believe that there must be an attempt to not admit this recourse against judgments that, because they refer to the status of persons, already have their specific recourse limiting the adjudged matter. Therefore, incidentally, without going into the phenomenon in depth, the challenge, through full reinstatement, of the decree rejecting the filing of a new cause of nullity of marriage does not seem advisable or wise.[1] Its rejection would be a way of settling once and for all the question of whether full reinstatement is appropriate against this type of judicial resolution.[2]

Therefore, in view of what has just been stated, here is one more attempt to stress the need to support the concept of a material adjudged matter, of the *iudicatum*, as stated in the *ius vetus*, by understanding it according to the spirit of canonical law, and also by understanding that it is recognized in its efficacy, with the appropriate limitations, in our system. The decretalists believed that this quality possessed by judgments, in that they were pronounced *rationabiliter*, made them unsusceptible to modification or change. In the canonical juridical system, in which all judgments must be reasoned (c. 1612 § 3), taking into account the guarantees of truth and correctness offered by the double approval given at various instances in the process, it can be concluded that definitive judgments that acquired finality support that requirement: *rationabiliter decisa sunt*. And given that it is law for the parties and the judges, they deserve to be protected by the *exceptio rei iudicatae* unless there arises, with due verification of its existence and apparent veracity, any of those events enumerated in law that may limit said efficacy.

3. *Limits due to defects of nullity that a canonical judgement can contain according to the presuppositions enumerated in cc. 1620 and 1622.*

The definitive canonical judgment has the double effect characteristic of the adjudged matter from the moment it becomes final. However, outside of the appeal, and within the respective terms of cc. 1621 and 1623, it can be challenged because of a remediable or irremediable defect of nullity through the plaint of nullity. Moreover, there are other nullities outside of these canons: those of cc. 1433, 1437 § 2, 1511. Although the exercise of the plaint does not go directly against the adjudged matter itself,

1. Cf. C. DE DIEGO-LORA, “Eficacia de la cosa juzgada...,” cit., nota 26, pp. 193–194.
2. Cf. J.J. GARCÍA FAÍLDE, “Comentario a Sentencia TRR de January 12, 1954,” in *Revista Española de Derecho Canónico* 13 (1958), pp. 121–122.

this effect is doomed to vanish, disappear completely, if, through the exercise of the plaint of nullity, a closed definitive judgment is declared null.

Regardless of whether the system sanctioning judgments with nullity could be the object of a different treatment, (following, for example, the criterion established in *SNAS*, 103 for the application of the *REU*, which is the requirement that the procedural act be valid, in spite of the defect, if it meets the objective for which canonical law established it), the formal rules still meet certain demands for guarantees that deserve to be respected in support of the justice of the decision. The double approval guarantees in principle that said formal norms were complied with when the two consistent judicial resolutions were pronounced. But if any cause of nullity enumerated in cc. 1620 and 1622 is incurred, observance of the formal law is imposed, which guarantees said justice, except in the situation of c. 1619, a specific remedy provision. A judgment in which said defects are proven would deserve another judgment declaring its nullity. This is an event with a formal origin that also limits, as a second effect of nullity, the adjudged matter itself.

CAPUT I
De re iudicata

CHAPTER I
Adjudged Matter

1641 **Firmo praescripto can. 1643, res iudicata habetur:**

1° si duplex intercesserit inter easdem partes sententia conformis de eodem petito et ex eadem causa petendi;

2° si appellatio adversus sententiam non fuerit intra tempus utile proposita;

3° si, in gradu appellationis, instantia perempta sit vel eidem renuntiatum fuerit;

4° si lata sit sententia definitiva, a qua non datur appellatio ad normam can. 1629.

Without prejudice to can. 1643, an adjudged matter occurs when:

1° there are two conforming judgements between the same parties about the same matter and on the same grounds;

2° no appeal was made against the judgement within the canonical time-limit;

3° the trial has been abated or renounced in the appeal grade;

4° a definitive judgement has been given from which, in accordance with can. 1629, there is no appeal.

SOURCES: c. 1902; SN can. 429

CROSS REFERENCES: cc. 1520–1525, 1607, 1611,1°, 1628–1629, 1630 § 1, 1633, 1635, 1636 § 1, 1642–1644, 1677 § 3, 1682, 1684–1685, 1687–1688

COMMENTARY

Carmelo de Diego-Lora

1. The canon, before enumerating the four situations in which the adjudged matter is understood to occur, makes a proviso in favor of the provisions of c. 1643. Causes on the status of persons never become an adjudged matter, including cases on the separation of spouses. The last phrase was not then included in c. 1902 *CIC*/1917.

The new *CIC*, by beginning with this proviso in this canon, which is so important in the history of the canonical process, attempts to forestall, we believe, criticism expressed in the later times on c. 1903 *CIC*/1917, which provided, in its first paragraph, the same absolute denial today provided by c. 1643, which is taken into account in the first words of c. 1641. From those critical points of view, this c. 1903 was believed to be self-contradictory, with respect to what was set forth in its second paragraph. This paragraph made way for recourse against two conforming judgments, which would have to rest on limited causes outside of the process itself that have already been handled and decided. This recourse still bore some similarity to recourses of review, characteristic of some civil procedural legislation, precisely conceived as possible and extraordinary limitations on the effects of an adjudged matter brought about by firm definitive judgments.

It was also understood to be incompatible with c. 1902, 1° *CIC*/1917, which, without reservation, set forth the general principle that, regarding an adjudged matter, occurs when there are two conforming judgments. It also was incompatible with c. 1987, which, in spite of the references that c. 1989 made to c. 1903, gave a letter of freedom to remarry to spouses whose marriage had been declared null by two conforming judgments, unless there was a new appeal granted that could then be filed by the defender of the bond, in which case this juridical status of freedom to marry would have required three conforming judgments, (or only two if the defender of the bond should renounce in a timely manner the second appeal already filed). And it was also incompatible with the former c. 1988, by virtue of which it was necessary to expressly mention the firm judgment, obtained through those conforming judgments, in the baptism and marriage books in order to publicly verify, *erga omnes*, that nullity was formally declared with finality.

However, on many occasions in law, juridical phenomena have their own consistency not only by virtue of the words of the law, but because of the very force of their effects. Those canons of the *CIC*/1917 that were just mentioned today still correspond with those of the current *CIC*, which are: c. 1643, which still denies the efficacy of the adjudged matter in causes on the status of persons, in contrast with c. 1644 that only authorizes lodging one recourse against two conforming judgments in

processes on the status of persons, the *nova causae propositio*. We can describe it as extraordinary, inasmuch as it can only be lodged by setting forth new and grave evidence or reasons, by which there is effected a certain material adjudged matter that allows the claiming of the adjudged matter exception if said admitted evidence or reasons are not sufficiently proven in the admission of the petition phase, or they do not deserve to be considered grave.

Moreover, in the presence of c. 1644, it could be said that the two conforming judgments in principle enjoy the favor of the law, because they cannot be directly challenged, an effect characteristic of the formal adjudged matter (c. 1642 § 1). They also enjoy the effect of a material adjudged matter (c. 1642 § 2) until the situation provided in c. 1644 occurs, in accordance with the phenomena regulated therein. Moreover, the positive effect of the material adjudged matter also occurs in the judgment of nullity when it is upheld by another judicial resolution favoring nullity. In fact, nullity declared in this way becomes law for the parties to the extent that c. 1684 expressly recognizes the right to remarry for those persons whose marriage was declared null by a final judicial resolution. Moreover, it is admitted by c. 1685 that the final judgment of matrimonial nullity becomes executory for the purposes of *ex officio* incorporation of the nullity into the books of marriage and baptism. And all this is regardless of whether in the future there is a possibility of a petition for the new proposition of the cause pursuant to the provisions of c. 1644.

2. In view of the canons just mentioned, it can be maintained, as we have on repeated occasions, (*vide* introduction to this tit. IX and the commentary on cc. 1643 and 1644)[1], that c. 1641, at least in no.1°, applies to all definitive canonical judgments, once they become final. This finality is acquired because they can no longer be directly challenged. This type of challenge is none other than the ordinary recourse of the appeal. Therefore, *the effects of an adjudged matter also occurs in causes on the status of persons*, in its aspect as a formal adjudged matter as well as a material adjudged matter, *although* this latter *must be considered limited in view of cc. 1643 and 1644*. Thus we have the analysis of c. 1641, for which other norms must also be taken into account, such as c. 1682 for appealing judgments of nullity of marriage, as well with regard to the finality of these judgments when they were pronounced in the documentary process, as in cc. 1687 and 1688 for these purposes.

It is necessary to clarify that everything that has just been stated must be understood in connection with the adjudged matter effect caused according to no. 1° of c. 1641. With respect to the other paragraphs of the same canon, we will highlight their peculiarities as we go through this exegesis.

1. Cf, likewise, commentary to cc. 1641–1644, in *CIC Pamplona*.

This no. 1° of the canon, which is not an exact repetition of its precedent, c. 1902, 1° *CIC*/1917, enjoys high technical precision and completes a full understanding of the adjudged matter. This does not only occur when there are two conforming judgments, but the conformity requires that said judgments be pronounced in different procedural instances having *easdem partes*, refer to the same object of the proceedings, *de eodem petito*, and be pronounced in consideration of the same cause of action, *ex eadem causa petendi*. The canon, in this section, summarily describes with much accuracy the so-called *three identities* characterizing judgments the conformity of which causes an adjudged matter in the canonical procedural system.

However, the canonical norm still has some defects, not because of what it says, but because of what it does not say, perhaps because it believes it to be understood. It should say "definitive judgments," as described by c. 1607. Another deficiency is due, in our understanding, to the fact that in the drafting of the canon the adjudged matter is excluded from judgments pronounced in causes on the status of persons, which nonetheless normally acquire, when they are causes on the nullity of marriage, their double conformity through another type of judicial resolution having less solemnity than the judgment. It even dispenses with the adjudged matter resulting from the documentary procedure, in which the first judgment of nullity, if not appealed, can acquire finality and produce the effect of an adjudged matter, unless, as in other judgments on causes on the status of persons, the phenomenon set forth in c. 1644 occurs later.

Starting fromhere, it must be stated that *the adjudged matter* in the canonical procedural system *generally occurs in the first place*, as expressed in letter of no. 1° of the canon, because of the two conforming judgments between the same litigants, on the same petition, and based on the same cause of action. Moreover, this latter requirement for the adjudged matter, in causes on the nullity of marriage, always allows, without affecting the efficacy of the canonical adjudged matter, the future lodging of a petition with the same *petitum* that was previously resolved with finality between the same litigants on the same object of the process (nullity of marriage), *provided that a new cause of nullity not yet presented is claimed*. Each cause of nullity, even if it is accumulated with others in the same petition, maintains its own identity, and is not confused with the others that are also claimed, even if all of them coincide in the same *petitum*, nullity. This is why c. 1677 § 3 provides that the formulation of the doubt must specify the grounds, if there are more than one, on which nullity is petitioned. The definitive judgment, which is pronounced in these causes of nullity, would fall short of full congruence with the petition if the court does not give the proper answer to each of the doubts, arising from each of the grounds (c. 1611,1°). Consequently, the new petition for nullity supported by a cause of action that was not alleged in the previous process, in which two conforming judgments were pronounced, is not a new proposition of the cause according to the provisions of c. 1644, but is

merely a new cause that is distinct, therefore, from that in which the double conformity occurred previously. Therefore, according to the requirements of c. 1641,1°, the adjudged matter exception is not appropriate with regard to this new cause.

In the second place, maintaining the three identities that were mentioned, the *adjudged matter* effect of c. 1641,1° *occurs in every judgment pronounced for the nullity of marriage in the first instance once confirmed by decree of the court of appeals*, pursuant to the provisions for an appeal of these judgments in c. 1682 § 2. Canon 1684 § 1 echoes this judgment of nullity confirmed by decree, subjecting it to the same treatment as the two conforming judgments, and also making it executory for the purposes of registration in c. 1685. On the other hand, c. 1684 § 2 provides for said coincidence in the effects when it provides that there is no direct recourse of appeal, but the extraordinary recourse of the new proposition of the cause of c. 1644, based on new and grave evidence or arguments, which also applies to every judgment of nullity of marriage, be it confirmed by another judgment or by a decree.

In conclusion, no. 1° of the canon could state the limiting conditions to be: if there are two conforming definitive judgments, and in causes of nullity of marriage, moreover, when the judgment of nullity pronounced in the first instance is confirmed by decree, and the litigants, the petition made, and the cause of action are the same.

It is possible to imagine a situation in which two conforming judgments reject the nullity claimed. We believe that the effects of an adjudged matter are also present and there cannot be a second recourse to an appeal, that is, a direct challenge of what was decided therein.The matrimonial juridical relationship, however, the object of the challenge, is protected in the same situation, with the same favorable presuppositions that it enjoyed from the very moment the marriage was entered into. If either of the spouses wishes to challenge this marriage, he or she may not again formulate a petition alleging the same cause of nullity that was previously dismissed, because the second judgment is protected by the adjudged matter of c. 1641,1°. The only means of challenge available for said marriage, apart from requesting nullity on new grounds not previously alleged, is to lodge a new proposition of the cause based on new and grave arguments and evidence, as in c. 1644. This possible solution, for the sake of justice in the specific case, does not exclude causes of nullity of marriage but, as well stated in c. 1644, is common to all causes on the status of persons.

3. *The adjudged matter also occurs* in the situation of no. 2° of the canon, *when the judgment was not appealed within the canonical time limit*. This time period of fifteen canonical days is provided in c. 1630 § 1, which will be calculated from when the party becomes aware of the publication of the judgment.

Therefore, the adjudged matter occurs as an effect of the definitive judgment, when it acquires finality because of double conformity, which renders the judgment unappealable, as well as when just one judgment acquires that same finality because it was not appealed in the canonical time limit by the injured party (c. 1628). In both situations we find that canon law grants them the same efficacy, that of an adjudged matter, which renders them unappealable (c. 1629, 3°).

This effect of the adjudged matter does not occur, on the other hand, in judgments pronounced in causes of nullity of marriage, because they are subject, when their pronouncements are in favor of nullity, to the automatic recourse of the appeal regulated by c. 1682. Thus, these judgments, when pronounced for nullity, of necessity follow the procedure of the appeal, which must end with a new conforming judgment or, if applicable, by the decree of ratification, both pronounced by the higher court. If this recourse is prevented by some unexpected occurrence, or if for any other unforeseen reason the subsequent confirming judicial resolution confirming it is not pronounced, the first judgment of nullity is completely ineffective, as if it were not a judgment. This is because its effect would always be pending the next confirming judicial resolution, be it a judgment or a decree, if applicable.

However, *the first judgment of nullity of marriage when it is pronounced in the documentary process*, unlike those pronounced in the ordinary nullity process, can have the effect of an adjudged matter. In these cases, the automatic appeal of c. 1682 is not allowed, but the voluntary appeal is, on the initiative of the injured party or the defender of the bond, by which, if there is no appeal, the declaration of nullity of marriage pronounced in the first instance will achieve that effect of an adjudged matter established by c. 1641, 2°.

If, on the initiative of a party, in this special, summary, documentary process, there is an appeal to the judge of second instance and he upholds the previous judgment, the double conformity of the judgments will be protected, with respect to its effect, in the adjudged matter of c. 1641, 1°.If, however, the confirmation is not decided, the judge, according to c. 1688, cannot make any decision other than to remit the cause to the court of first instance for proceedings in that instance pursuant to the ordinary nullity process.

The party injured by a judgment denying nullity (either an adjudged matter due to double conformity in this documentary process, or because the first judgment pronounced achieved that effect when it was not appealed within the time limit determined by c. 1630 § 1), —cannot thereafter seek nullity of his or her marriage except through a new filing of the case according to the provisions of c. 1644.

4. *Another way of bringing about the adjudged matter* is offered in c. 1644, 3°. It can occur for a judgment that is already at the appeal stage,

even if, naturally, it is a first judgment, *if the appeal expires, or if the appeal lodged in a timely manner is renounced.*

They are two very different phenomena, expiration and renunciation. The concept of and procedure for expiration is contemplated in cc. 1520–1523 and renunciation in cc. 1524–1525. In all these canons, what is contemplated and regulated is basically expiration and a renunciation of the instance, and more for the first instance, although c. 1525 § 1 mentions the renunciation at any stage or phase of the proceedings. But all these canons contain concepts and requirements that enjoy a general scope and can be applied to an understanding of these juridical phenomena, once the proceedings are at the appeal stage.

Canon 1520 provides that *expiration occurs* when the process is paralyzed without the parties' *nullo obstante impedimento,* taking any legal action for six months. In this case, *instantia perimitur.* Instance should be understood as not just the first instance, but also the second instance and any other subsequent instance that may apply. According to c. 1522, its first effect is that the acts of the process expire, but not those of the cause. That which expires is the procedural evolution itself, inasmuch as, if the possibilities for procedural acts no longer exist, the only thing that would be valid based on what already took place would be those acts already performed which, (in that they refer to the cause itself, to the substance of the process), enjoy a somewhat permanent value, a consistency that exceeds the strict limits of the procedure. Therefore they could be used in another procedural context according to the provisions of c. 1522 itself. But the concrete process that began is extinguished without possibilities for future action, just as the parties to that process loose the right to the judgment that the onset of that instance granted them.

The second instance, or a subsequent one, handles the challenge in the appeal of a judgment that has already been pronounced in a prior instance and reached its term pursuant the law. The expiration of this subsequent instance only extinguishes the procedural action of the appeal. As the acts of challenging and of activating the appeal are acts of the process, the process ceases, at the instance in which it is found, due no further activity for six months. Thus a peculiar effect is brought about: everything taking place at the prior instance maintains its validity, and in turn the appealed judgment is no longer subject to any challenge, inasmuch as the recourse and its proceedings had no effect whatsoever, and therefore the judgment submitted to the recourse acquires finality. Consequently, it acquires the efficacy of an adjudged matter according to the provisions of c. 1641, 3°.

But the appeal lodged, apart from possibly being extinguished due to the expiration defined in c. 1520, has a unique way of legally incurring that expiration or lapse of the instance, also with the resulting effect of an adjudged matter on the appealed judgment. It is not enough to appeal within the time limit indicated in c. 1630 § 1, subsequently, the appeal must be

pursued by the same appellant before the higher judge within the terms provided by c. 1633. Canon 1635 refers to this term as that of the appeal when it provides that, once these time limits lapse, either for an appeal before the judge *a quo*, or the formality of the appeal before the judge *ad quem*, *deserta censetur appellatio*. Here the term of cc. 1520–1521, *peremptio*, is not used, but, once the appeal is file with the judge *a quo*, it is still a way in which the subsequent instance can expire because of a lack of activity by the party, even if in this case the lack of activity is during the legal time limit that is shorter than what was previously indicated. In fact, the same thing will still occur: the instance already initiated through the appeal will be rendered ineffective, and the judgment that was appealed acquires finality, with the resulting effect of producing the adjudged matter.

With respect to the *renunciation* of the instance once it is admitted by the judge, its effects are the same as those of expiration, pursuant to c. 1525, by which it concerns the acts of the process as well as the acts of the cause. Therefore, its effect must be the same as that indicated for expiration of the instance in the appeal, namely, expiration of the recourse lodged and the proceedings that follow, resulting finality of the appealed judgment, and efficacy for this judgment of the adjudged matter pursuant to 1641, 3°.

However, c. 1636 § 1 made a specific provision on this renunciation of the appeal, through an express reference of its effects to the provisions of c. 1525. Moreover the effects that this latter canon described does not really contemplate the existing difference between the juridical phenomenon created by a renunciation of the first instance and that produced by a renunciation of the second or subsequent instance. The decisive efficacy of this consists of favoring the appealed judgment, which, once submitted to challenge, comes to acquire finality and to have the effect of an adjudged matter. In the renunciation of the first instance, the process expires and the procedural rights of the parties have no efficacy. In the renunciation of a subsequent instance, the process has achieved its ultimate finality, inasmuch as the definitive judgment was pronounced in the prior instance. The definitive judgment, due to a renunciation of the appeal, becomes a firm judgment, that is, unappealable from the formal point of view, with the ability, from the juridical-material point of view, to become executory and have its pronouncements protected, in any future process, with the exception of an adjudged matter.

The effects of expiration, as well as those of the renunciation of the instance, of c. 1641, 3°, cannot take place in ordinary processes on the nullity of marriage when the appealed judgment has been in favor of nullity. The regulation of the automatic appeal in c. 1682 prevents a judgment of nullity of marriage, other than the one that achieved confirmation through another judgment pronounced by a higher court or by a decree ratifying it, from being deemed an adjudged matter in the canonical procedural system. However, the norm of c. 1641, 3° does apply to the declaration of

nullity of marriage through the documentary process. If in this process the appeal is on the initiative of the injured party and the defender of the bond, both expiration and a renunciation can take place, although in this latter case the defender of the bond must take into account that *appellare debet* of c. 1687 § 1, the normative criterion of which must be noted if it is appealed as well as if the appeal is waived.

5. *Lastly,* the adjudged matter *also occurs in the situation* described in c. 1641, 4°, the last of the causes indicated.

If an adjudged matter occurs every time a definitive judgment achieves finality, either because of two conforming judgments after the appeal or because it was not appealed within the time limit established by law, or because, once appealed, said appeal was extinguished, (due to a lack of formalities in the legally-established time, or due to expiration of the appeal lodged, or due to a renunciation by the party who lodged it),it is logical that, when the definitive judgment, due to its very nature, is not susceptible to an appeal, it acquires finality *ipso iure,* once it is legally published. This is what is acknowledged in this no. 4° of the canon: when the definitive judgment, due to its very nature, is not appealable, it creates the adjudged matter. And it creates it because, if not appealable, that definitive judgment immediately acquired finality.

Canon 1641, 4°, in order to indicate which definitive judgments are not appealable, refers to c. 1629, but perhaps it should specify c. 1629, 1°, because the remaining sections of this latter canon either do not refer to definitive judgments (nos. 4°-5°) or they refer to a different recourse, that resulting from the plaint of nullity of the judgment (no. 2°), or they refer to the adjudged matter itself (no. 3°). Thus, when c. 1641, 4° cites c. 1629, including no. 3°, it is making a circular argument.

Therefore, the definitive judgments that produce an adjudged matter *ipso iure* are those of c. 1629, 1°, that is, judgments coming *ipsius Summi Pontificis vel Signaturae Apostolicae,* while the judicial resolutions enumerated in nos. 2°-4° rarely could be described as definitive judgments, due to their incidental nature and because they will also commonly adopt the form of decrees. Decrees will not be appealable, but that does not mean they are the equivalent to the definitive judgment mentioned in c. 1641, 4°. Rather, in these latter cases, they are decisions made for the process in which they are pronounced, and their efficacy ends there. Yet the adjudged matter always has a material juridical dimension that transcends the process itself.

Judgments pronounced by the Signatura in the exercise of its judicial power in the contentious-administrative process established by c. 1445 § 2, which nonetheless include other decisions of the Signatura that could be administrative, create an adjudged matter. Therefore, for a better understanding of c. 1445, we must turn to *PB,* 123 §§ 1 and 2, in order to determine the scope of strictly judicial competence in which the activity of

the Signatura is carried out in this field, in that § 3 of this article seems to refer strictly to the knowledge and judgment on activities of the administrative power. Regarding the competence attributed to the CDF (*PB*, 52) to handle "crimes against the faith and also the most grave, committed against morals as well as in the celebration of the sacraments," we believe that it can be administrative or judicial, inasmuch as in the scope of knowledge and the imposition of penal sanctions, as well shown in cc. 1720 and 1721, either the administrative or the judicial process can be followed. When the procedure for the declaration or imposition of sanctions has been administrative, the canons referring to the adjudged matter obviously do not apply. If, however, the criminal process was followed, in principle, those judgments could be said to be appealable, because they are not contemplated in the situation of c. 1629, 1°. This last statement must be understood, nonetheless, with all the provisos. In fact, the norms by which the CDF is governed, according to *PB*, 52, belong to "common as well as *proper*" law, which implies that that Congregation can have particular procedural norms for imposing or declaring sanctions. Those particular procedural norms are known to exist, and they are also known to be secret. Consequently, hazarding a guess regarding the definitive nature of judgments pronounced in those cases is still an exercise of the imagination, insofar as the particular norms by which they are governed are not known.

Definitive judgments pronounced in the situations just mentioned, since they are not appealable, acquire finality *ipso iure* and, consequently, the cannot be directly challenged, an effect of the formal adjudged matter, as well as the effects characteristic of the material adjudged matter. These consist of, making pronouncements that are law for the parties and binding for the bodies of power of the Church, generating the *actio iudicati*, and proposing the *exceptio rei iudicatae*.

1642 **§ 1. Res iudicata firmitate iuris gaudet nec impugnari potest directe, nisi ad normam can. 1645 § 1.**

§ 2. Eadem facit ius inter partes et dat actionem iudicati atque exceptionem rei iudicatae, quam iudex ex officio quoque declarare potest ad impediendam novam eiusdem causae introductionem.

§ 1. An adjudged matter has the force of law and cannot be challenged directly, except in accordance with can. 1645 § 1.

§ 2. It has the effect of law between the parties; it gives the right to an action arising from the judgement and to an exception of an adjudged matter; to prevent a new introduction of the same case, the judge can even declare such an exception ex officio.

SOURCES: § 1: c. 1904 § 1; SN can. 431 § 1
§ 2: c. 1904 § 2; SN can. 431 § 2

CROSS REFERENCES: cc. 8, 135, 1462 § 1, 1501, 1584–1586, 1607, 1611,1°,2° et 4°, 1614–1615, 1620, 1623, 1628, 1629,3°, 1641, 1650, 1668 § 3, 1684–1685

COMMENTARY

Carmelo de Diego-Lora

1. *Res iudicata firmitate iuris gaudet.* This is how § 1 of the canon begins, using a sentence in which *res iudicata* is the subject. But the *res iudicati* (*vide* introduction to this tit. IX and the commentary on c. 1641) is the effect possessed by certain judgments, those contemplated by canon law in the four situations enumerated by c. 1641. The judgments described therein are those that produce the adjudged matter. This is precisely what c. 1629, 3° clarifies when providing that the judgment *quae in rem iudicatam transiit* does not have an appeal. This judgment has become unappealable, that is, it has come to enjoy the juridical quality of a closed judgment.

That which is being directly challenged, however, through the avenue of the appeal, is the judgment, not the adjudged matter. The party injured by said judgment is the one who has the right *a sententia appellandi as iudicem superiorem* (c. 1628). The right to appeal the judgment lasts as long as it does not have the effect of an adjudged matter. If this effect has already occurred, the judgment cannot be appealed. First, therefore, in the order of things, there is the judgment, then the adjudged matter.

Therefore, the existence of the adjudged matter depends on whether the definitive judgment (c. 1607) is unappealable pursuant to c. 1629, 3°, by being included in any of the phenomena of c. 1641, the canon defining which judgments have the effect of an adjudged matter.

There has been an attempt to again analyze these concepts of the final judgment and the adjudged matter in their order, outside the letter of the canon, in that the legal text presupposes and focuses on the adjudged matter directly in order to affirm that the adjudged matter itself, in judgment pronouncements, enjoys the force of law and juridically cannot be challenged. Thereafter, only indirectly through c. 1645 can it lose that invulnerability, through the *restitutio in integrum* (full reinstatement), as it can also lose it indirectly through the *querella nullitatis* (plaint of nullity) of cc. 1620 and 1621, if the plaint is successful, although c. 1642 § 1 makes no mention of this last point.

2. Canon 1904 § 1 *CIC*/1917 has served as an inspiration for § 1. It considered the adjudged matter, not only from the point of view of its direct unchallengeability, but especially of the juridical value that the adjudged matter provides to the formal truth expressed in the final definitive judgment. Thus the formal truth of what was decided in the judgment, through the supposition *iuris et de iure*, identified with the material truth. This identification was presented as an true objective result of a logical operation that begins with the pronouncement of the judgment, which is a formal truth, but which, given the methods utilized in order to achieve it and the solidity of that result, inasmuch as said judgment is no longer appealable, ends up being stated legislatively as a material truth, although it does so through the authority provided by the supposition *iuris et iure*.

Thereafter no evidence against that presumptive result of what was legally concluded will be allowed, because the canon maintains that this formal truth can be nothing but a just and true expression of what has been the object of the process and has been resolved by the final definitive judgment. The adjudged matter, in the meaning of c. 1904 *CIC*/1917, thus serves as a spotlight that undoubtedly makes known the same material truth, the knowledge of which formally attests to the judgment.

Through the presumption *iuris et de iure*, however, a juridical fiction is not created, but it is elevated to the general category of a product of experience, which is what characterizes every legal presumption. By virtue of that juridical experience, there is an awareness of the generality of those cases of formal truth, expressed in the final definitive judgment, a result that completely coincides with the material truth that was investigated in the proceedings. By virtue of the adjudged matter, that truth formally declared by the final definitive judgment is recognized and sanctioned as a material truth, through the presumption *iuris et de iure*.

3. That investing of the formal truth contained in the judgment with the authority of an adjudged matter, through the presumption *iuris et de iure*, presumably identifying it with the material truth, made c. 1904 § 1

CIC/1917 proclaim the truth and justice of the judicial decision. Canon 1642 § 1, however, now offers a simpler formulation.

Apart from the fact that the presumption *iuris et de iure*, contrary to what was provided in cc. 1825 § 2 and 1826 of the *CIC*/1917, has been eliminated from the cc. 1584–1586 of the current *CIC*, which only accepts the presumption *iuris tantum*, the *CIC* has decided to maintain that the efficacy of the adjudged matter definitely, lies first in its stability. This is its tendency to persist in the future without the threat of any type of new procedural claims that may be lodged in an attempt to reverse it.

Therefore, c. 1642 § 1, instead of using an explanatory instrument of the presumption *iuris et de iure*, which is a bit artful and also a bit marginalized today by juridical doctrine, in order to maintain that stability, states that said stability and that tendency to remain free of eventual future threats from potential subsequent judicial claims come from considering that the adjudged matter, a fruit of the final definitive judgment (c. 1641), *has the force of law.*

The order of these same canons (1641 and 1642) shows that first it establishes how the adjudged matter is created through the finality of the judgment, and then it provides that first quality possessed by the adjudged matter, stability, the very force of law. Canon 1641 § 1 will not even state that the adjudged matter is positive law, a particular way that positive law is expressed, a statement that c. 1642 will then make in § 2. For now, canon law only shows us a first effect, namely, that it has the quality of law, its finality, its stability and tendency to last in the juridical system.

However, the finality of the law does not mean that it is impossible to change or revoke its positive norms. But those phenomena of change or normative reform must be subject to certain rules. Hence the finality of law possessed by the adjudged matter, which can no longer be directly challenged (and this *is the effect contemplated by c. 1642 § 1, that of the formal adjudged matter*), is not a juridical absolute, but it leaves open the possibility of eventual revocation if the requirements established in c. 1645 for *in integrum* reinstatement are met. Moreover, even if c. 1642 § 1 does not refer to it expressly, the adjudged matter can also be without that efficacy of the finality of law that the canon provides indirectly through the plaint of nullity, if it is successful. These recourses can be considered as limitations of the adjudged matter (*vide* introduction to this tit. IX). To them we must add, with respect to judgments pronounced in causes on the status of persons, which we understand to also produce the adjudged matter, the extraordinary recourse regulated by c. 1644, designated as *nova causae propositio.*

4. Due to the various expressions in its wording, the text of § 2 of c. 1642 also exceeds the efficacy of the material adjudged matter that c. 1904 § 2 *CIC*/1917 granted. The former canon stated that the adjudged matter becomes law between the parties and that the adjudged matter exception was granted, albeit without using those terms, but describing

said exception: *ad impediendam novam eiusdem causae introductionem.*

The text of c. 1642 § 2, however, sets forth the three different aspects characterizing the efficacy of the *material adjudged matter.* They are:

a) *Eadem facit ius inter partes*

As has been indicated, this effect was already set forth in c. 1904 § 2. But stating that the adjudged matter becomes law between the parties is much more than stating, for example, that juridical business executed by the parties is law binding on those executing it, a juridical norm of a voluntary origin to which the parties are subject and from which obligations can arise for them.

The law of the adjudged matter does not pertain merely to the parties who were subjects in the process and have been submitted to the pronouncements of the judgment. Neither does it come from the mere will of those who have been affected by it. Rather it is an objective law made positive by those who have the *potestas iudicialis* in the Church.

Although the process begins at the initiative of a party (c. 1501), a law arises from the judgment, which law comes from the authority of the Church in the exercise of its jurisdictional power. It is a law that is expressly formulated on specific requests and in its expression adopts a precise form of mandate that is set forth in the judgment (c. 1611, 1°). This judgment in turn has some precise ways of being made known to its recipients, through its publication in accordance with law (cc. 1614, 1615 and 1668 § 3). It is not only a law between the parties, but also a law for and regarding the legal-procedural parties, from which a duty to submit and observe always arises for them. However, rights, obligations, and other inherent responsibilities can also derive therefrom (c. 1611, 2° and 4°).

The formulation of this particular law in the judgment, even if it affects given subjects, who are the parties to the litigation, will in turn affect their heirs and can affect any others who are legally involved with those parts of the procedure. Even if it has a very particular object on which the very power is exercised, that adjudged matter of the judgment is also law for those exercising the power of governance in the Church, especially, given the peculiarity of the juridical object governed by particular law, for those holding office and those who in their name exercise the judicial and executive power in ecclesiastical society (c. 135).

From that point of view, if, in the judicial, administrative, or executive sphere, a matter should arise that could influence in any way what was already decided judicially in a judgment, as the adjudged matter effect, the bodies of one power or the other must absolutely respect those decisions, because they constitute a *praeiudicium,* as stated in the closed definitive judgment. Judges and administrative bodies must respect that adjudged matter efficacy of the judgment, which makes it intangible and

grants it the finality of law in ecclesiastical society. Therefore, also for any decision to be adopted in the future, in any of those fields of juridical action, if it maintains any relationship with the decision that resolved the already-decided object, it will have the authority related to the juridical statement or statements contained in the previous judgment. This influences, as any other general or particular law influences, the decisions of the ecclesiastical authority when they are related to that juridical object discussed in the judgment. Therefore the term *praeiudicum* must be used as a determining factor, inasmuch as it is specified law, of any decision or position that the authority of the Church must adopt in connection with, or starting from, said object, already definitively resolved with finality by the judge or court of the Church.

b) *Dat actionem iudicati*

This effect was not particularly expressed in c. 1904 § 2 *CIC*/1917, but it was set forth with the same clarity and efficacy in c. 1917 § 1 and in the following canons within the title discussing execution of the judgment.

The action of executing what has already been decided by a closed definitive judgment will clearly depend on whether or not it is exercised by the party favored by the judgment and the party for whom rights are recognized and granted that, inasmuch as they are connected to obligations and other responsibilities of the losing party, subject this losing party to the initiative of the party seeking execution of the judgment. Execution of the judgment is a right of the parties arising from the closed definitive judgment, without prejudice to, in some situations foreseen by canon law, provisional execution of a judgment lacking finality (c. 1650).

Before proceeding to execution, the party favored by the judgment must obtain from the competent judge a mandate that the judgment be executed, which will take place through an executory decree (c. 1651).

In purely declarative judgments, from which obligations arise, but which in the public interest and for the good of the sacrament entail automatic execution, exercise by the party of the *actio iudicati* will not be needed. This is because the initiative of the execution is attributed ex officio, of that *actio* that definitively entails observance of what is decided in the judgment. This occurs with judgments of nullity of marriage duly confirmed by the higher court, in its first and fundamental effect, nullity, which entails an *ex tunc* nullity, release from the previous bond, as a direct result of the rule of law (c. 1684). In a second effect, this occurs in reference to the recording of that nullity, at the initiative ex officio attributed directly to the judicial Vicar by c. 1685.

c) *Dat exceptionem rei iudicatae*

Here we will not discuss other aspects of this adjudged matter exception (*vide* introduction to this tit. IX and commentary on c. 1641). Now, we will only highlight how c. 1642 § 2 *in fine* literally repeats the

finalizing conception that c. 1904 § 2 of the *CIC*/1917 had of the adjudged matter, *ad impediendam novam eiusdem causae introductionem.*

We would also like to present the innovation introduced by the new version of the Code in this canon regarding, also, the procedural initiative, *quam iudex ex officio quoque declarare potest.*

In this norm, the adjudged matter exception has come to be what procedural doctrine designates an improper exception, because it does not need to be claimed as an exception by the litigant, a characteristic of the exception in a strict sense. In fact, the adjudged matter, as we have previously seen, is a specified objective law; a law that has been concretely positivized by the judge or court with respect to a precise juridical object that has been presented on the basis of a given cause *petendi* (c. 1641). The pronouncement or pronouncements of the judge or court, formulated in a closed definitive judgment, can no longer be said to pertain only to the parties, they pertain to the entire canonical system.

However, because those judgments that produce an adjudged matter are not the object of a universal publication such as in general or particular law, judges generally have no reason to know of them (c. 8). Therefore, the normal way to have that adjudged matter reach a judge or court other than the one that pronounced the judgment, will be for a party to claim an exception pursuant to c. 1462 § 1. But if said judge or tribunal, without there being any exception alleged, should in any other duly accredited way come to consider the existence of a judgment that produced the adjudged matter and that, once alleged, would prevent the introduction of the same resolved case, it must *ex officio* use said exception. This is because the law contained in pronouncements of that judgment, in spite of their particular nature, pertains to the entire juridical system, which must always be taken into account, to the extent that it is appropriate in each case, when judicial power is being exercised.

5. The letter and spirit of the text of c. 1642 § 1 possesses a very accurate description of the efficacy of the *formal adjudged matter* of the closed definitive judgment, as understood in procedural doctrine.

Moreover, the text of c. 1642 § 2 also sets forth with a high degree of technical accuracy what procedural common doctrine describes as the *material adjudged matter*, namely, law of the specific case, the executory efficacy of the final definitive judgment, the adjudged matter exception, even determinable ex officio by the judge or court, in protection of the principle *ne bis in idem* and as a requirement derived from the need to observe the canonical system. This system also includes judicial decisions, which have, first, the finality of law and then, from a normative point of view, they themselves are law.

1643 **Numquam transeunt in rem iudicatam causae de statu personarum, haud exceptis causis de coniugum separatione.**

Cases concerning the status of persons never become an adjudged matter, not excepting cases which concern the separation of spouses.

SOURCES: cc. 1903, 1989; SRR Decisio, 20 iun. 1922 (AAS 14 [1922] 600–607); PrM 217 § 1; CI Resp., 8 apr. 1941 (AAS 33 [1941] 173); SN can. 430

CROSS REFERENCES: cc. 1151 § 1, 1153, 1155, 1492 § 2, 1607, 1621, 1641–1642, 1644

COMMENTARY

Carmelo de Diego-Lora

1. The text of the first part of the canon sets forth an absolute principle: *cases concerning the status of persons never become an adjudged matter.* This norm, by being worded in the negative, gives an absolute character to what is said in its text, which is a verbatim repetition of the first paragraph of c. 1903 *CIC*/1917. However, that canon in the former Code, in the second subparagraph, added a text that still contradicted the principle set forth immediately before, when providing that, notwithstanding (with the conjunction *sed; however, but,* which seemed contrastive), when there are two conforming judgments in these causes, a new proposition of the cause could not be admitted if this cause is not based on new grave arguments or documents.

Therefore, in c. 1903 *CIC*/1917, at the same time that it absolutely provided that causes on the status of persons never become an adjudged matter, that absolute principle was limited to the phenomenon in which new arguments and documents appear, inasmuch as if these arguments and documents were claimed in a new cause being lodged, this cause would have to be admitted and handled.The text of c. 1643 of the current Code, however, has dispensed with this exception, merely stating the absolute principle of denial of the adjudged matter in these causes. If something is added to its denial, it is not an exception such as that of the old repealed canon, but an additional clarification that this provision excluding the adjudged matter includes causes on the separation of spouses. Later in this same commentary we will return to the amplification of what is understood as causes on the status of persons.

However, in spite of the fact that the new text of the canon, compared to its precedent in the previous Code, could be meaningful in the sense that in the new canonical procedural system the principle of absolute denial has been stressed, the *CIC* 83 has introduced a new canon, c. 1644. This canon limits, or rather conditions, that absolute negative, moreover in a manner similar to what was previously done in c. 1903 *CIC*/1917.

2. In our opinion, the text of c. 1643 is also included in a description of efficacy and recourses, which allows a broader understanding of what, from a superficial reading, is literally presented as an absolute denial. This is because the adjudged matter is still limited by the determining fact that a new cause on the status of persons can be lodged if new and grave evidence or arguments are furnished. (For a more detailed exposition of the proposed interpretation, *vide* introduction to tit. IX and the commentary on cc. 1641 and 1642).

This issue did not go unnoticed by the consultants who worked on the development of the new Code, as seen by what is known of the session of December16, 1978.[1] With regard to c. 297 of the *schema*, however, which corresponds to the present 1641, they managed to substitute the words: *Firmo praescripto can. 307, res iudicata habetur* for the terms that began the canon, *res iudicata habetur*, which were the terms in c. 1902 *CIC*/1917. That c. 307 today is c. 1643. Moreover, when discussing the text of c. 307 (now c. 1643), it was suggested that it could be worded differently, but this proposal was not successful: "causae de statu personarum, haud exclusis causis de coniugum separatione, transeunt in rem iudicatam ad normam can. 297, salvis casibus et effectibus de quibus in can. 308." This latter canon would then become c. 1644 of the current legal text. The consultants were against the idea that causes becoming adjudged matters, according to the current c. 1641, could become so with the proviso of the cases and effects established in what would be the new c. 1644.

The intent of the consultors, after what has just been indicated, is categorical: there is no room for conditions or limits on the absolute denial, because causes concerning the status of persons cannot, in any case, become an adjudged matter. However, in view of these attitudes, barring any limitation, there is no avoiding c. 1644, which indeed authorizes a new proposition of the cause at any subsequent time if new and grave evidence and arguments are adduced and presented before the admission of the new cause. The letter of the norm is not always clear. Nor is the intent of its drafters clear about when they had to write the canon, when the context and other legislative areas warn that that letter of the law is not precise in its expression, or its drafters did not achieve what they intended,

1. Cf. *Comm.* 1 (1979), pp. 155–157.

given that they themselves, in other norms, indirectly limited, through another procedural instrument (the duly-founded *nova causae propositio*), what they wished to demonstrate with the drafting of a legal text that they attempted to present as if it did not have gaps. In our opinion, on that occasion, after that proposal was considered, a magnificent opportunity was missed to eliminate a long-standing confusion that should have been clarified in the new canonical text.

3. Perhaps they felt the weight of canonical tradition that began with Gratian. From a juridical point of view, he still had a conception of the *res iudicata* as *iudicialis deffinitio*, which led him to then formulate one of the first contributions regarding dual conformity as a formally preclusive fact creating the adjudged matter. Nonetheless, he formulated certain exceptions to the irrevocability of the *iudicatum*, which was derived from deceit because it was the cause of a deceptive result experienced by the judge. There was also the case of the judgment issued against the provisions of law, which brought about the duty to overturn it for the judge who pronounced it and his successors, once they became aware of said illegality.

Muselli[2] has devoted a thorough study to the consideration that the adjudged matter had throughout the history of canon law. Here we will highlight some details we believe to be essential for this commentary, taken from some of our reflections[3] on the work of this author, written some time ago. As time went by, decretists and decretalists found juridical situations arising from final judgments that deserved to be tried anew, as occurred with causes dealing with spiritual matters, inasmuch as any injustice could harm them. The same thing occurs with criminal matters, especially when the judgment is excommunication. Maintaining an evil resulting from an unjust judgment is perceived to originate a *periculum peccati*. In matrimonial matters, the perpetual revocability of the judgment because of the *periculum animae* is also sustained.

Canonical doctrine of the 13th century attempted to teach an organic theory of the judgment and of the *iudicatum*, but in turn it tries to extend this discipline to all those causes, such as those related to baptism and holy orders, in which it warns that an unfair judgment can result in a *periculum animae*. However, there were enough decretals that attempted to reinforce the *iudicatum* and to limit exceptions. Nonetheless, further on it is noted, and the work of Lancelotti confirms, that the concept of the *iudicatum* is devalued in canon law and that the position of doctrine, which commonly reflects usual practice, is casuistry and given to an increasingly extensive enumeration of the exceptions to the adjudged matter, among

2. Cf. L. MUSELLI, *Il concetto di giudicato nelle fonti storiche del diritto canonico (dalle origini al XVII° secolo)* (Padova 1972).
3. Cf. C. DE DIEGO-LORA, "Del pasado al futuro de la 'res iudicata' en el proceso canónico," in *Ius Canonicum* 13 (1973), especially pp. 195–204.

which judicial causes on benefits are even indicated. Writers such as Scaccia and Decio will come to maintain, perhaps in an attempt to find a doctrinal logic in what is observed to occur in judicial practice, that it is enough to know that the judgment may be unfair, because no unfair judgment may become an adjudged matter.

A valid way of avoiding the consolidation of an unfair situation would later come to be, apart from the direct invocation to the Pope, turning to the Roman Rota in order to prevent the judgment considered unfair from being executed. In subsequent evolution, the Rota was even turned to for a new review of the case, even if it was a summary examination of the facts, for the purpose of deciding if it the adjudged matter should be confirmed as lawful or if, on the contrary, full reinstatement was appropriate. In practice this position came to mean nothing but an absolute denial of the change to an adjudged matter, which, generally, was what was traditionally recognized in spite of the abusive use being made of its exceptions.

To be precise, *CIC*/1917 in this way dispensed with the expression *ratio peccati*, as it also dispensed with the spiritual or criminal nature of the cause, for the purposes of indicating exceptions to what today we call the material adjudged matter. The adjudged matter, according to *CIC*/1917, occurs in all cases, in all canonical processes, if the judgments pronounced therein fit into any of the criteria of c. 1902. There is no adjudged matter only for cases on the status of persons, according to c. 1903. But, according to this same canon, there will not be an adjudged matter if a new cause is proposed in order that new grave reasons or documents be presented. If they are not presented, even if the *CIC*/1917 does not express it as clearly as it is stated here, there will also be an adjudged matter for definitive final judgments on the status of persons.

The remaining causes, on the other hand, will produce an adjudged matter in their final definitive judgments, albeit limited by the extraordinary recourse *restitutionis in integrum*, necessarily based on specific cases enumerated in c. 1905 *CIC*/1917. We have also indicated that every definitive judgment is still indirectly in danger of a possible hypothetical plaint of nullity, which must be lodged within the lawful term if exercised as an action, although as an exception, this nullity, if irremediable, can be perpetually claimed as any exception (cc. 1667 and 1893 *CIC*/1917, in this way parallel to cc. 1492 § 2 and 1621 of the current Code).

The system of the *CIC*/1917 has been basically transplanted, with only minor variations, to the procedural system of the Code of 1983. With respect to causes on the status of persons, the absolute principle of denying the adjudged matter, provided in c. 1643, finds the compromise offered in c. 1644. By virtue of this canon, *a contrario sensu*, definitive and final judgments pronounced in causes on the status of persons will become adjudged matters provided that new grave arguments or evidence are not furnished in a new proposition of the cause, and also presented to the

tribunal within the established legal time limit.That *nova causae propositio,* however, cannot be admitted by the tribunal because the *exceptio rei iudicatae* operates.

4. The last issue presented here is that of determining what is understood by "causes on the status of persons," subject to the special juridical treatment provided therefor in cc. 1643 and 1644. On April 8, 1941, the CPI[4] implied that causes on matrimonial separation were included in said causes. No doubt ever arose regarding cases dealing with the sacred bond of marriage, the bond of holy orders, or on religious profession. The inclusion of cases on the separation of spouses, now contained in c. 1643, has been nothing more than a consequence of the previous response, but it was also an opinion shared by the authors.[5] Some writers also include criminal matters among these cases. Apart from the fact that they are not causes on the status of persons, in our opinion, they do not need judicial reasons with new and grave arguments or evidence for an unfair judgment that achieved finality to be rendered ineffective. Fundamentally, the institution of the remission of a penalty grants the competent authority of the Church broad power to remedy possible injustices in criminal matters, among other things.[6]

However, it seems that there is a profound difference between these types of cases, although they all deal with the status of persons. We believe, strictly speaking, that special treatment of causes on the status of persons has always had a rationale justifying it. It is, above all, the *ratio sacramenti,* more than any other reason, that can reasonably provide a basis, against the efficacy of the adjudged matter, for a new trial to be issued in the new proposition of the cause, no longer on the closed definitive judgment, but on the validity or nullity of the sacrament, be it marriage or holy orders, in the light of new arguments or evidence that were not before the judge or tribunal when the previous judgment was pronounced. Therefore, in the new proposition of the cause, there is an attempt to form a new trial on that human act that left or, on the contrary, did not leave an internal imprint of the reality of the sacrament on those faithful who figured in said act before the Church.

In judgments declaring the nullity of holy orders apparently received, or of the marriage entered into by parties who publicly appear as spouses, the validity of what already occurred is declared valid, then null. The judicial verification of juridical realities that are stronger than the wills of the spouses in the litigation is proclaimed by the judgment *erga omnes.* It is a matter of deciding on something sacred that has occurred or has not occurred, but whichever is the case, something that is permanent,

4. Cf. *AAS* 33 (1941), p. 173.
5. Cf. E.M. CAMPOS DE PRO, "La cosa juzgada en el Código de 1983," in *Excerpta e Dissertationibus in iure canonico* 4 (1986), p. 492.
6. Cf. J. ARIAS, commentary to Lib. VI, part. I, tit. VI, in *CIC Pamplona.*

decisive for the interested parties and for the Church, unchangeable in view of any will that would desire, motivated by self-interest, to obtain a suitable or desirable result. Once the statements of will contained in these definitive judgments acquire finality, the juridical reality that is declared cannot be changed at the will of the individuals.

Causes on religious profession, however, even if they affect the status of persons, and it is a matter of resolving matters arising around the sacred bonds of profession, appear as objects of litigation that does not have that transcendence possessed by the protection of the sacramental reality. In any event, it would be the *ratio peccati*, the health of the soul, that would be in danger. However, in these cases, the health of the soul depends on more than the objective reality submitted to the process, on the attitudes and temperaments of the litigants. In these cases, procedural guarantees that are commonly found in the canonical process for verification of the truth and in order to guarantee the stability of juridical situations proclaimed by the judgment seem sufficient to protect this type of goods that bear a relationship with the person and their juridical-canonical statute. To our understanding, it would be sufficient for the ultimate protection of the truth, when it is believed that this truth was not faithfully set forth in the judgment, to use the recourse of full reinstatement, pursuant to the criteria regulated by c. 1645. However, given the response of the CPI mentioned above, judgments pronounced on this procedural object, which refer to the status of persons, could today also be subject to the occurrence of new, grave arguments or evidence of the *nova causae propositio*.

The same thing occurs with judgments pronounced in causes on the separation of spouses, be it the so-called perpetual separation (c. 1151 § 1) or the temporary separation (c. 1153 § 1). All these judgments are decisions on the object of the process lacking stability, which is revocable by nature, and even by agreement, between the separated spouses (cf. c. 1155). To our understanding, even if the judgment on the separation of the spouses acquires finality pursuant to the criteria of c. 1641, that efficacy cannot be said to be definitive regardless of whether or not we describe the judgment as definitive, in accordance with the concept of c. 1607, because it was pronounced in the case in chief. The will of the innocent spouse in favor of a resumption of conjugal life (c. 1155) is sufficient for them to again live as a married couple without a suspension of any of its effects. There are also cases of separation that bring about judgments the effects of which can cease (c. 1153 § 2).

These judgments, therefore, as long as the spouses live, will always be pending an event that can render them ineffective. They are not limitations outside of the object of the litigation, inasmuch as the limits of the adjudged matter on these cases depend on the revocable nature of said object of litigation. Therefore, it is the matter under litigation that, by its very nature, makes the efficacy of the judgment transitory.

Only when the spouses accept the judgment of separation that achieved finality, and this separation was pronounced without being conditional on any cause of cessation, if either of them, on his or her own initiative against the will of the other desires that the final judgment (that we can call definitive only according to c. 1607), be revoked or amended in any of its parts, he or she may seek it through the *nova causae propositio* of c. 1644, presenting new and grave arguments or evidence. Thus this could be the basis for full or partial revocation of that judgment the efficacy of which could only be extinguished, in principle, by the mutual will of the spouses.

1644 **§ 1. Si duplex sententia conformis in causa de statu personarum prolata sit, potest quovis tempore ad tribunal appellationis provocari, novis iisque gravibus probationibus vel argumentis intra peremptorium terminum triginta dierum a proposita impugnatione allatis. Tribunal autem appellationis intra mensem ab exhibitis novis probationibus et argumentis debet decreto statuere utrum nova causae propositio admitti debeat necne.**

§ 2. Provocatio ad superius tribunal ut nova causae propositio obtineatur, exsecutionem sententiae non suspendit, nisi aut lex aliter caveat aut tribunal appellationis ad normam can. 1650 § 3 suspensionem iubeat.

§ 1. If two conforming judgements have been given in cases concerning the status of persons, recourse to a tribunal of appeal can be made at any time, to be supported by new and serious proofs or arguments which are to be submitted within a peremptory time-limit of thirty days from the time the challenge was made. Within one month of receiving the new proofs and arguments, the appeal tribunal must declare by a decree whether or not a new presentation of the case is to be admitted.

§ 2. Recourse to a higher tribunal to obtain a new presentation of the case does not suspend the execution of the judgement, unless the law provides otherwise or the appeal tribunal orders a suspension in accordance with can. 1650 § 3.

SOURCES: § 1: cc. 1903, 1989; PrM 217, 218 § 2; SN can. 430; CM IX § 1

CROSS REFERENCES: cc. 1438–1439, 1444 § 1,2°, 1513 § 1, 1628, 1630 § 1, 1632–1633, 1634 § 2, 1638–1643, 1650, 1677 § 3, 1682 § 2, 1683–1684

COMMENTARY

Carmelo de Diego-Lora

1. *The new presentation of the cause*

Paragraph 1 of the canon uses the terms *nova causae propositio* and regulates an extraordinary recourse against a definitive judgment pronounced in causes on the status of persons, once they acquire force. The provision of this canon tempers the absolute negative principle of c. 1643

(*vide* the introduction to tit. IX and the commentary on cc. 1641–1643). Relating this latter canon to c. 1644, we can state: *definitive judgments in causes on the status of persons, when they come into force by dual conformity, produce an adjudged matter, provided that they are not challenged through a special recourse of the new proposition of the cause, necessarily based on new and serious proofs or arguments.*

All the reasons and evidence that were set forth in the previous process, which ended in dual conformity of the judicial resolutions, have already been considered. This is because all these elements were submitted to the just decision of the tribunals that were pronounced on the same object of litigation and the same cause of action between the same parties.

According to the letter of the canon, two conforming judgments are required. However, when it is a process concerning the nullity of marriage, the judgment of which was pronounced in favor of nullity in the first instance, for it to acquire force, it is enough that the appellate tribunal pronounce a decree of confirmation (c. 1682 § 1). This second resolution, if it conforms to the judgment of nullity, produces the force of an adjudged matter characteristic of the two conforming judgments, as well stated in c. 1684.

For this new proposition of the cause, the presentation of new factual information of an acknowledged gravity will be needed. This is due to the fact that the new claim is not directed to the tribunal in order that it issue an opinion on the illegality or the injustice of the final judgment that is now being challenged. Rather, this new hearing and proceeding that is sought through the new presentation will discuss this new serious factual information that was not taken into account in the judgment now being challenged, nor could it have been, in that it was not part of the prior proceeding. This justifies a review of what had already been decided.

For this reason, this new presentation of the cause, unlike what is characteristic of any type of recourse, dispenses with any indication of a time limit for its presentation. As the legal text expressly states, *potest quovis tempore ad tribunal appellationis provocari*. It simply depends on the time at which these new and serious arguments or reasons come to the challenging party. In view of these arguments or reasons, said party, by believing that said information can objectively raise doubts about the correctness of the judgment that acquired finality, decides in favor of a new presentation of the cause.

The distinction between the new presentation of the cause and any other recourse, and particularly the appeal, seems obvious. The canon certainly provides that the new proposition must be lodged before the appellate tribunal, but the attribution of competence to this tribunal does not mean that it is an appeal. Rather, it is a new claim with certain external elements that are the same as those of the appeal, but these similarities do not affect the nature of the recourse, which in the case of a new presentation, acquires substantially unique and different characteristics.

2. *Characteristic elements coinciding with the appeal*

a) The canon provides that a new proposition of the cause is lodged before the appellate tribunal. Appellate tribunal should be understood as the court that pronounced the second judgment of nullity of marriage conforming with the first, and in the case of a first judgment of nullity of marriage confirmed by decree, according to the appeal of c. 1682 § 2, the tribunal competent for the new presentation of the cause will be the court that is higher than this latter tribunal.

Canon 1632 § 1 provides, in the absence of any express indication, which courts are the appellate tribunals: those described in cc. 1438 and 1439. Moreover, taking into account that this new recourse is presented for a review of two conforming judicial resolutions pronounced in two different instances, normally this latter appellate tribunal will be the TRR pursuant to the provisions of c. 1444 § 1, 2°. An exception would be in locations, such as Spain, in which there is an organic and procedural privilege law by virtue of the mp *Nuntiaturae Apostolicae* on October 2, 1999[1]. Its art. 38 § 1 establishes the competence of the tribunal of the Rota of the Apostolic Nunciature of Madrid, in a subsequent instance, including in causes already tried by the Rota if a new proposition thereof is required (art. 37, 1, c.).

b) Another element apparently common to these recourses is the fact that, in both cases, since they are referred to the appellate tribunal, in practice, the new presentation of the cause, once the admission procedure takes place, is understood to be subject to the procedural norms of the appeal.

Canon 1644 says nothing in this regard. From a procedural point of view, its § 1 is only concerned with regulating the admission procedure. However, in the *coetus* of the consultors, when they were discussing c. 308 § 1, the antecedent of the current 1644, it was proposed that the words *servatis normis de processo summario* should be deleted from its text, which indicated the procedure to be followed. This was because § 2 of the same canon, however, was already referring to c. 296 (*novus*)—the antecedent of the current c. 1640, which regulated the appellate procedure, which is merely the procedure for the first instance, with necessary adjustments. This proposal received the unanimous approval of the consultors.

Nonetheless, surprisingly, they then proposed a change to § 2 of the canon, which was accepted. The wording of the amended text was exactly the same as 1644 § 2. Thus that direct reference to the appellate procedure in the first draft of the canon was deleted.[2] However, in our opinion, the current § 2 of the canon now contains at least an implicit reference to the appellate procedure. But the discussion we just mentioned demonstrates

1. Cf. *AAS* 92 (2000) pp. 5–17.
2. Cf. *Comm.* 1 (1979), pp. 157–158.

above all that the intent of the drafters of the *CIC* was to make the procedure to follow in the new presentation of the cause the appellate procedure, as set forth in the current c. 1640.

In accordance with this opinion, evidence may be added in the new presentation of the case. This evidence would of necessity have to deal with new and serious arguments or evidence which justified the admission of the cause. Moreover, any persons opposed to the new cause presented, may also furnish any claims or evidence discrediting or denying that the arguments or evidence furnished as justification for the new cause of action is new or serious.

Canon 1640 provides that the joinder of issues must be formulated in accordance with cc. 1513 § 1 and 1639 § 1. This is equivalent to stating that the new joinder of issues must be expressed according to the first formulation of the issues proposed by the judge or tribunal of first instance, which must also be expressed in processes on the nullity of marriage, if more than one cause of nullity is set forth, pursuant to c. 1677 § 3. What should be stressed is that this first formulation of the issues will then be the formulation that is drafted in the appeal, so that the court may decide if the judgment under appeal must be upheld or overturned in full or in part.

In this context, the similarity between the appeal and the new proposition of the cause seems obvious. However, that similarity is still more apparent than real. This is because, in fact, the object of the proceedings, the *causa petendi* and the subjects of the matter are the same in the first instance as in the second or subsequent action in which the double conformity occurred, and the same thing happens in the new proposition of the case.In a new presentation of the case, although the three identities of the previous judgments are the same, because of dual conformity, the adjudged matter, a new factual element (new and serious arguments or proofs), must be introduced. This new factual element, without altering the *petitum* of the complaint nor the cause of action, claims new knowledge of the case disputed by the judge or tribunal and a new opinion that must be issued in order to again decide if the final definitive judgment deserves to be upheld or reversed, in view of the new and serious arguments or proofs. These new factual elements, arising in a case that was already definitively resolved, serve as the basis for a review of what has already been tried *without the need for an change to the structural assumptions* in which the various instances of that first process were set forth and on which the prior conforming judicial resolutions were based.

c) Due to the foregoing, the final definitive judgment submitted to the review of a new presentation of the cause can be upheld or overturned. If it is reversed, the adjudged matter is rendered completely ineffective, as can occur with the judgment of an appeal.

Thus we have either one more confirmation of the final definitive sentence, by which this judgment is still protected by the force of an adjudged matter according to cc. 1641 and 1642, due to the judgment

pronounced in the new proposition; or a reversal. In this case it could even entail beginning all over with subsequent appeals, until the judgment pronounced as a result of the new proposition of the cause acquires dual conformity resulting from the respective appeal.

In this latter regard, the judgment pronounced in the new proposition of the cause still has the appearance of a judgment reversing the previous judgment pronounced in the appeal. However, the new and serious arguments or proofs that were the basis for the review will still influence this judgment on the new presentation of the cause. Any subsequent instances that may take place in connection with a judgment of reversal pronounced in a new presentation of the case, even if they refer to the original object of the process and cause (or causes of action), must be judged only from the perspective of new and serious arguments or proofs, the bases of the admission of the new proposition of the cause and determining factors throughout its future procedural development.

3. *Characteristic elements in the differences between appeals*

a) In the first place, the greatest characteristic element of the appeal is the indication of a time limit for its lodging (c. 1630 § 1) and the subsequent time limit for it to be pursued or formalized (c. 1633). In turn, the appeal is lodged before the same judge or tribunal that pronounced the judgment under appeal.The formalization of said appeal, however, takes place before a higher judge or tribunal, within another time limit.

The new presentation of the cause is not formulated before the judge or tribunal that pronounced the judgment or confirming decree, but before the higher tribunal itself (cc. 1632 and 1644 § 1). Therefore, in this recourse it is not appropriate to refer to the duty of the lower court to send the acts to the higher court (c. 1634 § 2). This is because this transfer is not done in the new proposition, but rather only if the competent tribunal requests that those acts, that is, the copies of the acts, be sent to the tribunal that confirmed the newly challenged judgment.

Last, the new proposition of the cause can be lodged at any time, without being subject to any time limit. This characterizes it as an extraordinary recourse, which also rests on the fact that it is based on new and serious arguments or proofs. In fact, this type of challenge will depend on the will of the appellant, but also on the existence of the serious and new proofs or arguments on which the new proposition can be based.

b) The appeal is a recourse that is lodged against a judgment lacking force. Therefore, this recourse does not go against the adjudged matter, which has not yet occurred. The new proposition of the case, however, is against a definitive judgment on the status of persons once it has acquired

finality by dual conformity. Thus the adjudged matter occurs, which the new presentation of the case tends to render totally ineffective.

c) In order to have standing to appeal, one merely needs to be a party to the case, specifically, the party prejudiced by the judgment (c. 1628). This position is not sufficient to go against an adjudged matter produced by dual conformity of judgments. In order to file such a recourse, it is necessary to adduce and present the new and serious arguments or proofs that were not furnished or, therefore tried in the prior proceeding, the adjudged matter effect of which will be reviewed in the new presentation of the cause.

d) The admission of the appeal by the tribunal that pronounced the judgment being challenged is a simple act that is formalized with a decree of admission, once it is verified that it has been lodged by the party prejudiced by the judgment being challenged, and at the same time it is verified that it has been lodged within the time limit established by law.

On the other hand, the admission of the *nova causae propositio* requires that the person who lodges it must, within a term of thirty days, set forth the new proofs or arguments without which the recourse is impossible. But not only must the party present it, he or she must also furnish proof of those new and serious facts, because otherwise the new complaint would be dismissed *in limine litis* due to a lack of the necessary *fumus boni iuris* (c. 1505 § 2, 4º).

e) In the appeal, the tribunal will immediately admit the recourse, which will proceed in that court due to the simple fact that it is invoked by the office of the higher judge to review the judgment being challenged, attaching a copy thereof and an exposition of the reasons for the appeal (c. 1634 § 1), on which the appellate tribunal is not pronouncing at that time.The tribunal before which the new proposition of the cause is lodged has another time limit of thirty days to issue its decree of admission in which it must issue a *prima facie* opinion as to whether the new cause seems to be based on new and serious arguments or proofs.

This preliminary and provisional hearing by the court regarding the adduced and presented new and serious arguments or proofs requires a preliminary act, in the style of a preliminary hearing which is mentioned in c. 1644 § 1, but not enough. In this preliminary hearing, it would be appropriate to hear at least the defender of the bond if they are processes on the nullity of marriage or of holy orders, in order that he report on the opinion warranted by the facts, with regard to their newness or seriousness, on which the petition for a new proposition is based. García Faílde[3] describes it as a special preliminary hearing, which is initiated, by the party seeking

3. J.J. GARCÍA FAÍLDE, *Nuevo Derecho procesal canónico* (Salamanca 1984), p. 242. In a similar sense, cf. J.M. IGLESIAS ALTUNA, *Procesos matrimoniales canónicos* (Madrid 1991), p. 213.

a new proposition, with a short brief, in which the new evidence and reasons must be adduced and explained, which is given to the other party, if he or she appears, and to the defender of the bond and the promoter of justice, if they intervene, in order for them to respond within the time limit indicated for this purpose. Whatever is necessary for the exposition of the evidence offered is furnished, and the result is reported to those participating in the cause, in order for them to state, within the term provided, whatever it is in their interests to state. Then the appellate procedure is followed. In any event, in our opinion, said preliminary hearing must take place within this second time limit of thirty days, established by c. 1644 § 1, in which we understand that the court must pronounce the decree of admission or the denial of the new proposition. Giving these acts prior to the admission a longer time limit would prejudice the proper administration of justice, always in conflict with the slowness of the process.

f) Every appeal, together with the common *in devolutivo* effect of sending the proceedings to the higher court, necessarily possesses a suspensive effect. Canon 1638 is quite meaningful in this regard, inasmuch as, according to c. 1650 § 1, only judgments that have become adjudged matters can be executed. However, there are certain conditions on these absolute norms, which allow provisional execution, but they must be specifically provided in the proper canon law, as shown in c. 1650, not only in that same § 1, but also in §§ 2 and 3.

Canon 1644 § 2, however, sets forth some principles that radically conflict with and invert the rules just described: the new presentation of the cause does not suspend execution of the judgment. And this is for a strong reason, inasmuch as there is an adjudged matter and it merits execution. However, it also has some provisos, an about face from what was indicated in c. 1650. If law expressly establishes otherwise, or in the opinion of the appellate tribunal, taking into account the probable basis for the challenge, it is feared that if execution is not suspended irreparable harm will be caused. In this case, the court can choose to make suspension conditional on the furnishing of a guarantee.

By way of an example, it is sufficient to consider the effect that dual conformity of judgments, or a judgment of nullity of marriage ratified by decree, has on the status of the spouses (c. 1684), in order to understand indeed how difficult it will then be if a new proposition of the cause to brings about that exceptional suspension of execution. This could only be prevented by a prohibition on entering into a future marriage, included in the judgment or decree of confirmation of nullity, or established by the local Ordinary. But this suspension of the effect does not find its raison d'etre in the fact that suspension of the effect of c. 1684 § 1 is being requested. Rather it comes from the prohibition imposed by the veto, the juridical nature of which is not strictly procedural, even if it is ordinarily adopted in the process, and which would also affect both spouses. Its basis does not lie in whether or not the final judgment is executed, but in

reasons of public order, and for the sake of the salvation of souls, regardless of the judgment itself in its reasoning and pronouncements.

g) Once a judgment is challenged in an appeal, a new ground cannot be admitted, not even for a useful accumulation of grounds, according to c. 1639 § 1. It is true that c. 1683 authorizes, for causes on the nullity of marriage, an exception, adducing in the appeal a new ground for nullity. Nonetheless, this is allowed for the sake of judicial economy, although c. 1683 ensures that the new ground or grounds, adduced in the appeal, are not added thereto or in any way confused therewith. In order to achieve this, it provides that the appellate tribunal may admit the new ground, but it must treat it as completely distinct from those previously claimed. This is because it will judge this ground as a court of first instance, and therefore cannot assume it to be a new reason for the appeal.

The new proposition of the cause is a request for review based on new and serious arguments or proofs. Its joinder of issues, like that of the appeal, is merely whether the previous judgment is upheld or reversed in full or in part. While in the appeal, there is a new hearing by the higher court on the previous judgment in connection with the same procedural elements and facts that were furnished at the first instance, (barring some evidence that may be presented for a limited purpose pursuant to c. 1639 § 2 and 1640), in the new proposition of the cause, that confirmation or reversal of the prior judgment will be declared according to the point of view that must be employed in approaching the object of the process that was already decided and its cause of action. The newness and seriousness of the arguments or evidence that have been used as the reasons for its admission by the competent appellate tribunal must be particularly taken into account.

These differences led Campos de Pro to maintain the following: "Based on the foregoing, we can conclude that it is an exceptional recourse that is based on the *ratio sacramenti*, which takes the form of a review proceeding." [4] Recently, Carlo Gullo,[5] has stressed the rationale for the new presentation of the cause as the good of the soul and the *ratio peccati*. However, it should be born in mind that since the very beginnings of this recourse, which is exceptional as well as extraordinary, the idea has been that a new examination of a judicial decision in a case that has already been definitively resolved with finality should only be granted for very well-founded reasons. This is because said decision must have the force of law, given that its truth and justice had a favorable presumption from the start in view of the procedural method used. To maintain otherwise could cause extremely grave harm, personally as well as socially.

4. E.M. CAMPOS DE PRO, "La cosa juzgada en el Código de 1983," in *Excerpta e Dissertationibus in iure canonico* 4 (1986), p. 514.
5. Cf. C. GULLO, "La nova causae propositio," in *Il processo matrimoniale canonico* (Vatican City 1986), p. 369.

This is due to the fact that the status of persons cannot be exposed to unending uncertainty, nor can the obligations and rights inherent to said status continue to permanently depend on human caprices, or on any threat or claims that may arise as a result of vendictive attitudes or at least the fruit of vindictive passions that are not always easy to satisfy.

4. *New and serious evidence or arguments*

The new proposition of the case must be based on *new and serious proofs or arguments*. If the proofs or arguments are not adduced, if they are not then presented, the new cause cannot be admitted by the tribunal. The confirmation, or, on the contrary, the reversal of the definitive, final judgment, after dual conformity, on the status of persons, which is what constitutes the *dubium* of this challenge, does deal with the same object of the process that was already decided according to the same cause of action between the same litigants. That object, however, is somewhat changed by the view that will emerge from the new proofs or new arguments adduced.

For the court to consider the review, it must make a new assessment of the evidence and the cause of action. Either the evidentiary weight and the strength of conviction will be taken into account by themselves, which would lead to a clear definition of the newness and of the seriousness by which they influence the solution by which the cause was already resolved, or the new evidence and arguments will complete and clarify the information that was already decisive for the solution reached, providing new points of light for a better knowledge of the truth surrounding the object of litigation. Naturally, the court may also find that they lack any real significance to change what was already decided with finality.

In fact, from the same moment in which the libellus that originates the new cause is admitted, doubts are being raised about whether said evidence or arguments influence the pronouncements of the judgment being challenged. This is the only issue that needs to be decided again by the appellate tribunal when considering the *meritum causae*. As García Faílde has indicated, unlike full reinstatement, which requires two pronouncements, (if the decision reverses the judgment being challenged, an *iudicium rescisorium*, and then another on the *meritum causae*), in the new proposition of the cause, "it is obvious that the judicial decision that decides the merits of the case, handled and settled in review, is submitted to the same challenge procedures as those to which it would have been submitted if the cause were heard in an ordinary appeal process." [6] Of course, this must be accepted purely and simply from a formal, external point of view, because, as to the substance of the process, the new and serious

6. J.J. GARCÍA FAÍLDE, *Nuevo Derecho...*, cit., p. 242.

evidence and arguments require from the court a new assessment of those objective facts, which would not figure in an ordinary appeal.

In this challenge, the problem essentially revolves around the nature and scope of the new evidence and arguments that can serve as a basis for a new presentation of the cause. As far as we are concerned, we have always maintained that this challenge, which we have been describing as exceptional and extraordinary, is a review of the final definitive judgment with information based on facts outside of the process that had previously been heard and decided, which could not be taken into account by previous courts that at various instances pronounced their fully conforming judgments.

From this point of view, we believe that our position is more in keeping with a particular doctrine set forth by the TRR. This occurs, for example, with the decree c. Palestro, of July 2, 1986,[7] which held that mere criticisms made against the preceding judgment were not new and serious arguments. According to the decree c. Ragni, of February 18, 1986,[8] lenient statements of the bishop expressing opinions that were already taken into account and rejected in prior judgments, and criticism formulated against pronouncements of the judgment, by the advocate of a party or by an expert are not new and serious arguments either. The same doctrine is set forth in the decree c. Pinto of May 30, 1986,[9] which deems that an expert opinion by a party, made to uphold the position of one of the spouses and not *pro rei veritate*, could hardly be considered a new and serious argument. Likewise, in an interlocutory judgment, c. Stankiewicz, of November 22, 1984,[10] stated that evidence and arguments must be understood as any type of legitimate evidence, but that those already exhibited in preceding instances are not. This made it clear that this challenge cannot be confused with an appeal.

However, we also find a different doctrinal position in other decisions of the TRR. This occurs, for example, with the decree c. Faltin, of April 10, 1987,[11] which deemed extrinsic new and serious elements to be unknown documents and other evidence, and intrinsic new and serious elements to be a distortion of the facts or serious procedural defects, also included in this category a manifestly erroneous interpretation of laws regulating the institution of marriage. Along the same lines, another decree, c. Fiore, of November 29, 1987,[12] found that new and serious arguments were an erroneous application of substantive and procedural law, as well as a distortion of the facts.

7. Cf. *Il Diritto ecclesiastico* 97 (1986), Parte II, pp. 487–494.
8. Cf. ibid., pp. 308–311.
9. Cf. ibid., pp. 289–293.
10. Cf. *Monitor Ecclesiasticus* 113 (1988), pp. 320–327.
11. Cf. *Il Diritto ecclesiastico* 99 (1988), Parte II, pp. 29–37.
12. Cf. ibid., pp. 452–461.

In keeping with this second position, Gullo[13] maintains that it is common knowledge that the concept of new and serious arguments or evidence must not be deemed limited to a material newness in the argument or evidence presented. Therefore, doctrine generally admits as new and serious elements an obvious error of law, a distortion of the facts, serious procedural defects, and even believes that the very arguments intrinsic to the decision can be taken into account.

In our opinion, if said position is accepted, the *nova causae propositio* would become, (contrary to the exceptional nature with which it is presented in c. 1644, as was its precedent, c. 1903 *CIC*/1917), simply a third instance against the conformity of two judgments pronounced in a different grade of hearing. Therefore, the need required by c. 1644 to adduce and present new proofs and arguments would be reduced to a purely rhetorical legal demand.

Subjecting again to a new trial what has already been decided with dual conformity, that is, after the judicial decision has acquired the finality generated thereby, making use of the same elements that were already considered by previous tribunals, would mean subjecting the stability of the canonical procedural system to a painful test. This would cause harm to the parties themselves, who deserve to have the rights offered by a final judgment respected, and to ecclesiastical society itself, which would be deprived of a formally declared truth that was nonetheless reached through a method of investigation to discover the material truth that no other method can guarantee as the judicial process can.

Only when new evidence and proofs, which were unknown and not considered by the previous courts, allow a suspicion, and then verify, that the divine law was violated, would a new presentation of the cause and a reversal of those conforming judgments be justified.

If this situation were always threatening, without being subject to any time limit for presentation, through the challenge of a new procedural instance, it would open a new area for rash litigants, suitable for unsatisfied parties, who are no longer acting within their rights and legitimate interests, but rather from their desires to win, to tirelessly upset the solemnity and efficacy of the canonical procedural system by making use of the very judicial organization of the Church.

Therefore, lastly, we would dare to suggest that the TRR, for the sake of unity of jurisprudence in the Church (*PB*, 126) should finish drawing the line between the area that belongs to its competence, as a court of instance, and what can belong more appropriately, for due correctness, sanctions, or rectification, to the sphere of vigilance entrusted to the Signatura.[14] In our opinion, within the sphere of the Signatura belong those

13. Cf. C. GULLO, "La nova causae...," cit., p. 377.
14. Cf. c. 1445 § 3,1° and *PB* 124,1°.

erroneous pronouncements resulting from alleged conduct by judges or courts warranting disapproval or other disciplinary sanctions, or cases in which it becomes evident that a judicial decision that is no longer appealable was based on opinions or ideologies that are not in accordance with Christian anthropology or the canonical doctrine of marriage. That would lead to nullities *ex officio* of those judgments, which would again open the way for an ordinary judicial instance to proceed to a just resolution of the particular case before the competent court of justice.

CAPUT II
De restitutione in integrum

CHAPTER II
Total Reinstatement

1645 **§ 1. Adversus sententiam quae transierit in rem iudicatam, dummodo de eius iniustitia manifesto constet, datur restitutio in integrum.**

§ 2. De iniustitia autem manifesto constare non censetur, nisi:

1° sententia ita probationibus innitatur, quae postea falsae deprehensae sint, ut sine illis probationibus pars sententiae dispositiva non sustineatur;

2° postea detecta fuerint documenta, quae facta nova et contrariam decisionem exigentia indubitanter probent;

3° sententia ex dolo partis prolata fuerit in damnum alterius;

4° legis non mere processualis praescriptum evidenter neglectum fuerit;

5° sententia adversetur praecedenti decisioni, quae in rem iudicatam transierit.

§ 1. Against a judgement which has become an adjudged matter there can be a total reinstatement, provided it is clearly established that the judgement was unjust.

§ 2. Injustice is not, however, considered clearly established unless:

1° the judgement is so based on proofs which are subsequently shown to be false, that without those proofs the dispositive part of the judgement could not be sustained;

2° documents are subsequently discovered by which new facts demanding a contrary decision are undoubtedly proven;

3° the judgement was given through the deceit of one party to the harm of the other;

4° a provision of a law which was not merely procedural was evidently neglected;

5° the judgement runs counter to a preceding decision which has become an adjudged matter.

SOURCES: § 1: c. 1905 § 1; SN can. 432 § 1
§ 2: c. 1905 § 2; SA Decisio, 6 apr. 1920 (AAS 12 [1920] 252–259); SN can. 432 § 2

CROSS REFERENCES: cc. 125, 1451, 1452, 1460 § 2, 1462, 1505 § 2, 1629, 1641–1644, 1650, 1655

COMMENTARY

Jorge de Salas Murillo

The *CIC* devotes four canons to the norms of full reinstatement (cc. 1645–1648), which, together with the adjudged matter, make up tit. IX of sec. 1, pt. II of Book VII *De processibus*.

To rescind is to annul or render without effect a contract, obligation, etc. Civil doctrine equates the terms annulability and rescindability and clearly distinguishes between nullity and annulability. The classic canonical concept of rescindability, where *restitutio in integrum* is maintained, is equivalent to the civil concept of annulability. *Restitutio in integrum* is the annulment of a strictly legitimate act, for reasons of equity.

1. *Historical sketch regarding the "restitutio in integrum"*

a) *Antecedents in Roman law*

The term *restitutio in intergrum* was coined in Roman law as a special type of action of fiction, the type of the *iudicia rescisoria*, given by the praetor when he wished to eliminate the effects of an act he deems unjust. For this purpose, he announced in the edict that he would totally rescind the act (*in integrum restitutam*) and then decided in each case, through a decree, if reinstatement was appropriate. Consequently, it is a decision made by the praetor, by virtue of his *imperium*, after the *causae cognitio*, to declare null a valid act according to civil law, due to the fact that said act caused harm that the magistrate found unjust.

Restitutio in integrum was also used procedurally, and it was thus adopted centuries later in canon aw, as a type of recourse against a judgment. Apart from traditional ordinary acts, such as the so-called *actio si iudex litem suam fecerit*, or the *actio iudicati*, *restitutio in integrum* is also configured as another procedural act, an act of non-ordinary jurisdiction, *magis imperii quam iurisdictionis*, which appears thus with a procedural nature, susceptible to being used by litigants provided that they request it of the magistrate, *iusta causa*, and the judgment is deemed to be unpronounced, and the *quaestio* is restored to the previous status, as if the litigation were not resolved. Precisely because it is a restoration that entails, on the part of the praetor, not only an examination of the issue,

but also a pronouncement on nullity, *restitution in integrum* must be described as a truly extraordinary method, in that the praetor invades the field and the functions of the judge. According to Murga,[1] although it was not originally conceived as a procedural recourse, it could nonetheless be used as such because valid judgments *iure civili* could, on occasion, result in an unjust situation, causing harm to one of the litigants. But only in serious cases (*ex magna et iusta causa*, e.g., cases in which the judge, the parties, or the witnesses were intimidated or threatened; or when deceit on the part of one of the litigants was provable, or in cases of falsification of evidence), was this procedural recourse to be used when there were final judgments. Were they otherwise, the very security of the process could be seriously affected.[2] Thus it seems that, inasmuch as *restitutio in integrum* is an extraordinary measure, it should be granted only in very specific exceptional cases,[3] initially, and probably case by case.[4] Later it was becoming more widespread, with edicts broadly setting forth all the elements in which it is granted:

— In the first place, it was required that a *harm* be caused by reason of the strict application of the *ius civile*. This harm must be objective harm;

— In the second place, there must have been a motive (*iusta causa*), that is, "an abnormal state that needs this extraordinary recourse, as an exception to ordinary legal norms."[5]

Therefore, there are two types of causes: edictal causes, or those defined in the edict, and the non-edictal causes, which will always be *ad casum*, in the opinion of the praetor.

The edict sets forth the following criteria:[6]

— *ob aetatem* (granted to minors to render without effect acts performed by them or their guardians that have caused them any patrimonial harm);

— *ob absentiam* (for the benefit of a party that was absent *rei publicae causa* when the act the effect of which is prejudicial occurred);[7]

— *ob capitis deminutionem* (for the benefit of the creditors of a person *sui iuris* who, having suffered a *capitis deminutio*, has lost legal capacity);

1. Cf. J.L. MURGA, *Derecho Romano clásico*, II. *El proceso* (Zaragoza 1980), p. 325.
2. Cf. ibid., p. 333.
3. Cf. ibid., p. 334; A. D'ORS, *Derecho privado Romano* (Pamplona 1968), pp. 113–114.
4. Cf. J. ARIAS RAMOS, *Derecho Romano clásico* (Madrid 1960), p. 209.
5. M. SAVIGNY, *Sistema del derecho Romano actual*, VI (translated by Mena and Poley) (Madrid 1930), p. 30.
6. Cf. J. DOVAL DE MATEO, *La revisión civil* (Barcelona 1979), p. 10; J.L. MURGA, *Derecho Romano clásico*, cit., pp. 362–363; A. D'ORS, *Derecho privado Romano*, cit., p. 85; M. SAVIGNY, *Sistema del derecho*..., cit., pp. 40ff.
7. Cf. ULPIANO, 12 ad. ed., D.4.6.1.1. The edition used here is KRÜGER and MOMMSEN (Eds.), *Justinianus Digesta* (Berolini 1962).

— *ob errorem* (for the benefit of a person who performed a juridical act that harms him or her as a consequence of an unforeseeable error, e.g. forgetting to file the appropriate *exceptio*, or committing a *plurispetitio* by mistake);

— *ob metum* ("quod metus causa gestum erit," annulling an act that was civilly perfect but carried out as a consequence of a threat of serious harm);

— *ob dolum* (rare phenomenon);[8]

— *ob fraudem creditorum* (for the benefit of creditors of the debtor that deceitfully brought about his or her own insolvency).

The *restitutio in integrum* procedure in Roman law had its logical evolution: in the classical period, active standing belonged to the injured party and his or her heirs. The *postulatio* was initiated before the magistrate in the presence of the other party within a specific time limit. In order for *restitutio in integrum* to be achieved, there must be no other juridical methods for achieving reparation of the harm suffered. If granted, reinstatement is not limited to the decree of the praetor, pronounced on the fiction of deeming the harmful act unperformed, but rather, the praetor must adopt any measures necessary for it to have a practical application.

The advent of the *cognitio extra ordinem* system[9] entailed divergences from said procedure, characteristic of the *ordo iudiciorum privatorum*. This new system became widespread in the fourth and fifth centuries, once the previous system disappeared, thereby highlighting the progressive absorption of *restitutio in integrum* into the new system of actions.

In post-classical legislation, the general rule of *restitutio* has been passed along through two constitutions from Constantine.[10] The most important issue is that of reserving *restitutio in integrum* exclusively for minors, abandoning other applicable cases. In these centuries, *restitutio in integrum* is an ambivalent action that is not only annuling, but also recovering, with simpler procedures than in previous centuries. In the times of Justinian, according to doctrine, this figure was only a remnant of the previous age, ineffective compared to other current methods. In the sixth century, it only remains in cases of minors and absences.[11] The statement that Justinian would have preferred to abolish it is not altogether correct, because the figure appears in the Justinian Digest as well as in the Justinian Code.

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8. Cf. J.L. MURGA, *Derecho Romano clásico*, cit., p. 363.
9. Cf. ibid., p. 366.
10. Cf. G. OLMS (Ed.), *Codex Theodosianus cum Perpetuis Commentariis Iacobi Gothofredi* (New York 1975), p. 183.
11. Cf. G. CERVENCA, *Studi vari sulla "restitutio in integrum"* (Milan 1965), pp. 7ff; and also L. RAGGI, *La "restitutio in integrum" nella cognitio extra ordinem* (Milan 1965), pp. 360, 381ff.

b) *Antecedents in canon Law*

It passed from Roman aw to canon aw. In the decree of Gratian, we find some canons that set forth this juridical institution, in connection with the law of appeals. However, the Decree of Gratian lacks the systematization and regulation of *restitutio*, which, according to doctrine, here seems like a juridical institution of a general nature, the application of which to the field of procedure gives place to the extraordinary remedy with the same name.[12]

In the Decretals of Gregory IX, it is not only granted to those under the age of twenty-five, as in Roman Justinian law, but also to the Church as moral persons.

There appear three decisive elements of *restitutio in integrum*, in continuity with Roman law: *extraordinary nature*, directed against a *valid juridical act*, causing *damage*.

The Council of Trent hardly contributed any changes in this regard, practically limiting itself to broadening the figure of religious profession. Thus, what began as an institution exclusively for minors in Roman law, in the Church was extended to other subjects deemed worthy of this favor.[13]

Subsequent canonical experts developed the doctrine around the three basic characteristics already set forth. Among pre-codal regulations, the following are worthy of mention: the Const. *Si datam* (1748) of Benedict XIV, the mp *Quando per ammirabile* (1816) of Pius VII, and especially the "*Regolamento legislativo e giudiziario*" (1834) of Gregory XVI.

The juridical systematization of *restitutio in integrum* improved when the *CIC*/1917 went into effect, in which actions (cf. cc. 1687–1689 and 1847 *CIC*/1917) as well as recourses were included under the name of *restitutio in integrum*. It was considered as an extraordinary recourse for remedying serious damage caused by a valid judicial or extrajudicial act (cf. cc. 1905–1907 *CIC*/1917). This remedy, according to *CIC*/1917, did not tend to rescind the rescindable act, but rather to put things into the condition in which they were before the act causing serious damage had been performed.

For a detailed study of the evolution of this figure in the history of canon law, we refer to the recent study by A. Bettetini.[14]

2. *Present regulation on "restitutio in integrum"*

a) *Concept and nature*

12. Cf. F. della Rocca, "Il processo in Graziano," in *Saggi di diritto processuale canonico*, I (Padova 1961), p. 224.

13. Cf. F.X. Wernz-P. Vidal, *Ius Canonicum*, VI (Rome 1927), p. 557, no. 729.

14. Cf. A. Bettetini, *La "restitutio in integrum" processuale nel diritto canonico* (Padova 1994).

In the *CIC*, we must define *restitutio in integrum* as the specific, special recourse of an extraordinary nature for challenging a manifestly unjust but valid judgment, which has become an adjudged matter. At present, therefore, *restitutio in integrum* is configured as a recourse similar to the recourse of review in civil systems. The canonical style survives in this juridical figure that, nonetheless, has been highly influenced by the recourse of review, from which it cannot be separated, because they are two related figures that come from the same origin and have the same function.This is remedying in the best way possible the effect of an unjust but valid judgment that has acquired finality in the respective system.[15]

Restitutio in integrum, since its inception, has always been directed against valid juridical acts. It has been an extraordinary remedy granted to temper the severity of strict law in those cases in which the injustice of a valid act caused particular harm. Although its historical development has been complicated, because it has been closely linked to the treatment of the nullity of the juridical act that for many centuries has been a dark, tangled issue, injustice is, and has been, the most profound foundation of this juridical institution.[16] The injustice is manifested in the harm caused and in the possible evidence of any of the phenomena contemplated by the legislator in c. 1645 § 2.

b) *Suppositions in which "restitutio in integrum" applies*

The current *CIC* configures *restitutio in integrum* as a true procedural recourse, of an extraordinary nature, limited to the elements considered in c. 1645, only for causes that have become adjudged matters. Therefore, it cannot be used for matrimonial causes and others airing issues on the status of persons. Notwithstanding the foregoing, there are writers who maintain the possibility of using this extraordinary recourse in matrimonial causes.[17] For example, Lawrence G. Wrenn writes in his commentary on the *CIC* that "It seems therefore (at least to this author) that the remedy of reinstatement may now be utilized in a marriage case, and that a party has a right to choose that remedy over others whenever the requirement of manifest injustice is verified. The advantages are obvious." It would probably have practical advantages, but we believe that the canon is emphatic and that its use is not appropriate in causes that do not become adjudged matters.

One might wonder why the possibility of this recourse of *restitutio in integrum* is denied for this type of causes. Certainly, in the same *CIC* we find situations in which the legislator allows the use of *restitutio in integrum* for another type of resolution.Thus in c. 1460 § 2, it is not

15. Cf. J. DE SALAS MURILLO, "La 'restitutio in integrum' en la historia y en el Código de Derecho Canónico de 1983," in *Excerpta e Dissertationibus in iure canonico* 4 (1986), pp. 277–281.
16. Cf. C. DE DIEGO-LORA, "Control de la justicia de la sentencia firme y definitiva en el proceso canónico," in *Ius Canonicum* 29 (1989), pp. 275–304.
17. *The Code Of Canon Law. A Text And Commentary* (New York 1985), p. 1004.

prohibited for resolutions denying the exception of relative incompetence. And jurisprudence has also admitted this recourse against the unappealable decree deciding recusal (cf. c. 1451).[18] From this, it seems that the object of *restitutio in integrum* is not only the final judgment or other unappealable resolutions, but the process itself. However, this recourse has been limited by the legislator to situations in which a judicial decision has achieved a degree of unappealability or a finality of the judgment, the effect of an adjudged matter. In this regard, it is appropriate to recall that, as indicated by de Diego-Lora, the adjudged matter means that "the judgment is seen as the final step of the legal trial because it cannot be challenged by ordinary judicial means."[19] This unchallengeability can be formal or material, which are the two types of an adjudged matter in canon law set forth in c. 1642. The judgment that has acquired finality enjoys the force of law, and to admit a subsequent recourse against it would violate juridical security. Therefore, only in exceptional cases, and in a restrictive way, can recourses of an extraordinary nature, which are *restitutio in integrum*, be admitted. In causes that have not become adjudged matters, the demands of justice are met by the possibility of beginning the process over again pursuant to c. 1644. *Restitutio in integrum* is an extraordinary recourse, established precisely as an exception for cases of flagrant injustice and the absence of other means of reparation. For causes on the status of persons, as a means of reparation, the legislator specifically provides that they will not become an adjudged matter.

c) *Suppositions in which the judgment was clearly unjust*

Manifest or obvious injustice is a condition for allowing the recourse, (it acts as the *fumus boni iuris* of the complaint), and is, at the same time, a requirement that must be proven and assessed in the judgment. Therefore, even if the defective judgment is manifestly unjust, the appellant must prove it with evidence of any of the conditions considered in § 2 of this canon. These conditions are the following:

1°) *The falsity of evidence.* Obviously it is not required that all evidence adduced be false, but only the evidence that has substantially affected the judgment. The appellant must demonstrate, therefore, the falsity of that evidence and also that the dispositive part of the judgment being challenged has been substantially based on that false evidence. For the recourse to be successful, the falsity of the evidence must be discovered after the judgment is pronounced.

2°) *New facts based on new documentary evidence.* Documents supporting new facts that were unknown when the judgment was pronounced have subsequently appeared. The documents collected must be decisive, meaning that if they had been furnished during the process, the content of the final judgment would have been different. The new facts, to which the

18. Cf. c. SABATTANI, May 25, 1962, in SRRD 54 (1962), pp. 263–266.
19. C. DE DIEGO-LORA, commentary to c. 1641, in *CIC Pamplona*.

documents must refer, must be so important that if the judge had been able to evaluate them when pronouncing judgment, the judgment would have been different. Because of the extraordinary nature of the recourse, it is understood that the judge should only admit documents in the strict sense, namely, writing suitable as evidence in a trial.

3°) *Deceit of one party to the harm of the other.* This situation considers fraudulent machinations, deceit, feigning, etc., by one of the parties, in order to obtain a favorable judgment, with the other party unaware of the deceit of the opposing party, for which it has suffered prejudice that deserves reparation. This cause is a consequence of the principle set forth in c. 125 § 2: "Any act performed as a result of fear which is grave and unjustly inflicted, or as a result of deceit, is valid, unless the law provides otherwise. However, it can be rescinded by a judgment of the court ..." The legislator grants this cause provided that the following elements are present: *a*) the deceit comes from one of the parties, although it does not exclude collusion with the judge, which would allow the lodging of a criminal action; *b*) to the harm of the other. The recourse based on this ground will be successful whenever the judgment is the direct result of the deceit, albeit not exclusive, such that if that deceitful attitude of the party had not existed, the judgment would not have been pronounced with the same content with which it was pronounced.

4°) *Negligent disregard of the provision of law of a not merely procedural nature.* This obvious disregard for the law, referred to in no. 4°, only affect those acts considered as laws. It is limited to substantive laws, that is, not merely procedural laws. This reason, due to its very nature, in the civil systems is considered susceptible to cassation and not to review, because it is a legal reason and not a factual reason that transcends the process. It belongs to cassation by infraction of the law of the civil systems.

5°) *Contradiction of a previous decision that has become an adjudged matter.* Decision should be understood exclusively as a judgment, in that the judgment is the only judicial decision defined by canon law that can bring about the effects of an adjudged matter. These two judgments must share the triple identity regulated in c. 1641, 1°: same litigants, same complaint, and same cause of action. If any of these three identities is missing, it would not be in full conflict with the judgment, and therefore full reinstatement could not be granted, because its injustice would not be manifestly proven.

1646 **§ 1. Restitutio in integrum propter motiva, de quibus in can. 1645 § 2, nn. 1–3, petenda est a iudice qui sententiam tulit intra tres menses a die cognitionis eorundem motivorum computandos.**

§ 2. Restitutio in integrum propter motiva, de quibus in can. 1645 § 2, nn. 4 et 5, petenda est a tribunali appellationis, intra tres menses a notitia publicationis sententiae; quod si in casu, de quo in can. 1645 § 2, n. 5, notitia praecedentis decisionis serius habeatur, terminus ab hac notitia decurrit.

§ 3. Termini de quibus supra non decurrunt, quamdiu laesus minoris sit aetatis.

§ 1. Total reinstatement based on the reasons mentioned in can. 1645 § 2 nn. 1–3, is to be requested from the judge who delivered the judgement, within three months from the day on which these reasons became known.

§ 2. Total reinstatement based on the reasons mentioned in can. 1645 § 2 nn. 4 and 5, is to be requested from the appeal tribunal within three months of notification of the publication of the judgement. In the case mentioned in can. 1645 § 2 n. 5, if the preceding decision is not known until later, the time-limit begins at the time the knowledge was obtained.

§ 3. The time-limits mentioned above do not apply for as long as the aggrieved party is a minor.

SOURCES: § 1: c. 1906; SN can. 433
§ 2: c. 1906; SN can. 433
§ 3: c. 1687; SN can. 207

CROSS REFERENCES: cc. 1405, 1407, 1408–1416, 1445, 1465 § 1, 1496–1500, 1645, 1673, 1694

COMMENTARY

Jorge de Salas Murillo

1. *Norms dealing with the attribution of competence*

Canonical tradition, assuming the Roman model of *maiestas imperialis*, attributed to the Roman Pontiff exclusive competence to grant extraordinary remedies such as the *supplicatio* or *restitutio in integrum.*

Beginning with the Fourth Lateran Council, that exclusive competence was gradually diffused in favor of the ordinary or delegate judges for causes within their competence, reserving the case of the so-called *restitutio in integrum gratiosa* for the exclusive competence of the Pope.

As indicated by Bettetini,[1] during the preparatory work for the *CIC*/1917, it was suggested that the classical doctrine of exclusive attribution to the Roman Pontiff be recovered ("Adversus rem iudicatam peti non potest restitutio in integrum, nisi ex gratia a Summo Pontifice"), but the proposal was not successful. The same author continues, "Canon 1906 of the Pio-Benedictine Code would have acknowledged general competence to judge on *restitutio* for 'iudex qui sententiam tulit', with the logical exception entailed in the event that the action was proposed adducing as the *causa restitutionis, neglectus legis* on the part of the same judge: 'quo in casu eam concedit tribunal appellationis'."[2]

The current norm of c. 1646 reaffirms the system of attribution that was in force after the Fourth Lateran Council, dividing competence between the judge who pronounced the judgment and the appellate judge, as we shall see below.

2. *The judge who issues the sentence and the tribunal of appeal*

The situations considered in c. 1645 are not substantially different from the causes established for the recourse of review in most civil systems. However, one of the fundamental differences is the distinct type of jurisdictional body used to hear this recourse. Civil systems reduce it exclusively to the competence of the supreme court, while in the Church, in principle, the same judge or tribunal that pronounced the judgment being challenged is competent.

The two provisions in c. 1646 indicate very different norms of attribution of competence. Some refer to the same judge who pronounced the judgment being challenged, and others refer to the appellate tribunal of the court that previously pronounced the judgment. This canon changes c. 1906 of the *CIC*/1917, which granted competence to the judge who pronounced the judgment, except in the case of no. 4°(violating legal provisions on the part of the judge), in which case competence was attributed to the appellate tribunal. The current *CIC* grants more competence to the appellate tribunal. According to c. 1445 § 1, 1° and art. 122, 1° of *PB*, the Apostolic Signatura is competent to hear petitions for total reinstatement against judgments of the Rota.

1. Cf. A. BETTETINI, *La "restitutio in integrum" processuale nel diritto canonico* (Padova 1994), p. 237.
2. Ibid., p. 237.

With respect to *restitutio in integrum* against a judgment of a delegate judge, in the cases provided by the *CIC* in c. 1646 § 1, in our opinion, that judge is no longer competent, because his task ends there and he would have to have express delegation in order to hear the reinstatement.

There is nothing to prevent the parties from asking the judge to recuse himself, according to the norms contained in cc. 1448–1450, and, with less reason, when the appellate tribunal is competent to hear the recourse. This recusal issue is resolved by a definitive decree reasoned in law and which, in principle, is unappealable (cf. cc. 1451 and 1629, 5°). There is nothing in doctrine to prevent the same judge who pronounced the judgment from then handling, in the cases found in c. 1646 § 1, the admissibility of this recourse.

If a gravely unjust judgment has been made, the party harmed thereby may have recourse by presenting a libellus of the petition for reinstatement, in which the party explains the manifest injustice of the judgment and the grounds on which total reinstatement is being requested.

Restitutio in integrum that is based on the reasons indicated by c. 1645 § 2, 1°–3° must be requested from the same judge who pronounced the judgment. When it is based on either of the other two reasons (cf. c. 1645 § 2, 4°–5°), it must be requested from the appellate tribunal of the court that first pronounced the judgment.

The judge or tribunal in question will or will not admit the petition for reinstatement if the requirements of c. 1505 are met. A copy of the judgment the party wishes to challenge must be attached to the petition.

3. *Time intervals for recourse*

This canon indicates a term of three months for all three grounds. For calculating this time limit, the canon establishes the day *a quo* differently according to the situation that serves as the *causa petendi*, also taking into account the uniqueness of each reason.

Thus it establishes that, in the three first instances (cf. c. 1645 § 2, 1°–3°), the time begins to run on the day on which knowledge was obtained of the reasons, while, in the cases of reasons 4° and 5°, it will run from the time when notice was received of the publication of the judgment. But in the case of no. 5°, if knowledge of the prior decision was obtained later, the time begins to run from that time.

These time limits must be understood as terms of expiry, or obligatory terms. They are legal time limits, a continuous stretch of time, although the term *a quo* is undetermined. This is so because if the time limits for appeal (cf. c. 1633) are considered obligatory time limits, that is, peremptory, those established for this extraordinary recourse must be considered thus with even more reason. If not stated otherwise, and in

restitutio in integrum the *CIC* makes no provision, these legal time limits cannot be extended and are peremptory (cf. c. 1465).

For minors, the term *a quo* is extended to the day majority is reached (c. 1646 § 3). This is the only special provision referring to minors that is found in the new regulation of this juridical institution. The action of *restitutio in integrum* that minors possessed in the prior legislation (cc. 1687–1688 *CIC*/1917) has been reduced by the *CIC* to an extension of the term *a quo*. Therefore, reinstatement can be requested by any subject, minor or adult, physical or juridical person, that is in the conditions indicated in cc. 1645–1646. Therefore, the only difference with respect to minors is the time limit.

1647 **§ 1. Petitio restitutionis in integrum sententiae exsecutionem nondum inceptam suspendit.**

§ 2. Si tamen ex probabilibus indiciis suspicio sit petitionem factam esse ad moras exsecutioni nectendas, iudex decernere potest ut sententia exsecutioni demandetur, assignata tamen restitutionem petenti idonea cautione ut, si restituatur in integrum, indemnis fiat.

§ 1. A plea for total reinstatement suspends the execution of a judgement which has not yet begun.

§ 2. If there are probable indications leading the judge to suspect that the plea was made to cause delays in execution, he may decide that the judgement be executed. The person seeking total reinstatement is, however, to be given suitable guarantees that, if it is granted, he or she will be indemnified.

SOURCES: § 1: c. 1907 § 1; SN can. 434 § 1
§ 2: c. 1907 § 1; SN can. 434 § 2

CROSS REFERENCES: cc. 1638, 1644 § 2, 1650 § 3

COMMENTARY

Jorge de Salas Murillo

Effects of the petition of "restitutio in integrum"

If the judge admits the recourse, execution of the judgment is suspended if it has not yet begun. The suspension takes place *ope legis,* but with a mandate from the judge or tribunal ordering the suspension. However, if it is suspected that the petition was made in order to delay execution of the judgment, the judge may order execution, although he must grant guaranties to the petitioner in the event that *restitutio in integrum* is granted. In this case, the judge will require that the executor furnish the proper guaranty in order to ensure that reinstatement can be complied with. This guaranty is understood to be demandable pursuant to the provisions of c. 1650. Moreover, the judge or tribunal must comply with the norms established by the bishop regarding a money deposit or guaranty to be furnished on payment of costs and compensation for damages provided in c. 1649.

This provision is a verbatim repetition of c. 1907 *CIC*/1917. The suspensive effect of the ordinary recourse is limited, in the extraordinary recourse of total reinstatement, to the case in which, at time the new request is made, the judgment has not begun to be executed, always reserving the case in which the judge finds that there are "probable indications" that the only reason the recourse is presented is in an attempt to delay execution of the judgment.

1648 **Concessa restitutione in integrum, iudex pronuntiare debet de merito causae.**

Where total reinstatement is granted, the judge must pronounce on the merits of the case.

SOURCES: —

CROSS REFERENCES: cc. 1494, 1509–1511, 1587–1591, 1611 § 1, 1614–1615, 1627, 1638, 1639, 1650–1655, 1656, 1657–1670

COMMENTARY

Jorge de Salas Murillo

1. *Procedure to substantiate the "restitutio in integrum"*

The canon imposes on the judge, in the event that he agrees to total reinstatement, the obligation to pronounce again, in a second judicial decision, on the petitions of the parties.

The *CIC* makes no provision regarding which procedure should be followed. Annulling a judgment, which became an adjudged matter, requires a procedure offering at least the same guarantees as the one in which it was pronounced, and, if there is an annulment and also a pronouncement on the merits, it requires a judicial resolution in the form of a judgment, that is, with the same formalities as the annulled judgment. Yet, the same process of reinstatement still has a very limited object, which is merely a determination whether or not any of the suppositions of c. 1645 § 2 exist. The new judgment that is pronounced, if appropriate, a second time on the merit of the case, is preceded by all the proceedings in the prior process, the judgment of which was annulled, apart from anything that is specifically handled as a result of the petition for reinstatement.

Therefore, it is conceivable that this cause of review does not need to be handled exactly according to the same procedure as that of the cause under review, if this procedure was an ordinary process. Not only does it not seem necessary to follow the procedure of the ordinary process, rather, everything indicates that the most suitable procedure is the oral contentious process.

In fact, it is provided (cf. c. 1656) that the oral contentious process will be applied to any cause not excluded by law, unless the party requests the ordinary contentious process. Since nothing is stated in this regard in cc. 1645–1648, it is possible to maintain that the applicable procedure is the oral contentious process, because it is a situation that falls underthe requirements of c. 1656. The only argument against this opinion is that the *CIC* could have provided for it, as it did in c. 1627 with the plaint of nullity.

The consultors eliminated from the codal regulation the provision contained in the previous *schemata* that established the impossibility of granting *restitutio in integrum, nisi auditis partibus.*[1] This means that the consultors had in mind the idea that this process should be governed by one of those considered in the *CIC*, either that of incidental matters (regulated by cc. 1587–1591) or the oral contentious process (included in cc. 1656–1670). These are processes that allow speed and procedural economy to be reconciled with the principle of guarantees for the parties.

Inasmuch as *restitutio in integrum* is directed against a judgment that became an adjudged matter, the object of this cause and its procedure rejects any classification that could equate them with an incidental matter. Consequently, the foregoing opinion is more reasonable, in the sense that for the purposes intended here, its most suitable procedural channel is the one that derives from the application of c. 1656.

Canon 1656 allows the oral contentious process to be followed in all causes not excluded by law, unless one of the parties asks that the ordinary contentious process be followed. The interested party could only state his/her desire to follow the ordinary process in the answer to the petition. It will be the judge, in view of the entire previous process, who will decide on the procedure to be followed, in order to avoid unnecessary delays.

The oral procedure begins with the lodging of the petition. In this regard, it is appropriate to indicate that the petitioner does not have to present a new brief. The previous libellus that served as the petition for reinstatement is sufficient. Thus the requirements of c. 1658 are met. Inasmuch as the judge already examined them, what truly initiates the procedure is the action intended to resolve the prior judgment. He will cite the respondent (cf. cc. 1509–1511), sending him or her a copy of the judgment and granting him or her the right to send a written response within a time-limit of fifteen days (cf. c. 1659). The respondent can offer any type of exception, and even lodge a counterclaim against the petitioner (cf. c. 1494). The rest of the procedure is governed by the provisions of cc. 1660–1670. Nevertheless, in that it is a very specific procedure, because there is an attempt to prove whether any of the causes of c. 1645 are present and to pronounce on a matter that has already been heard, the judge may make use of the faculties granted him by c. 1670 to move more quickly and issue a new judgment.

2. *Two judicial decisions needed for recourse*

Restitutio in integrum cases have two judicial decisions, the first rescinds or annuls, in which case the tribunal will again consider the petition of the parties, as set forth in the formulation of the doubts in the process under review. The second judgment is in the order of reinstatement.

1. Cf. *Comm.* 11 (1979), p. 159.

a) *Sentence of rescission*

The competent judge or tribunal that has admitted the petition for *restitutio in integrum*, after the procedure takes place, must find in the affirmative or the negative granting of this extraordinary recourse. Any judgment finding in favor of *restitutio* declares the nullity of the judgment being challenged, similar to "civil cassation." In the first judgment, the judge or tribunal will set forth the reasons for the decisions, which is a true *iudicium rescindens*. At a later time, once *restitutio in integrum* is granted, the judge must pronounce on the merits of the case.

b) *Sentence of restitution*

This ends the oral contentious process, provided that it has been preceded by the judgment of rescission. In this second judgment, the judge pronounces on the merits of the case. It is absolutely necessary to take into account that this judgment must be pronounced on the original cause, that is, it must settle the original dispute according to c. 1611, 1°.

Canon 1668 establishes that, if from the discussion it is not possible to infer the need for an additional instruction or the existence of another impediment to pronouncing judgment, the judge must decide the cause immediately, and alone, when the hearing ends. Moreover, the dispositive part of the judgment must be immediately read to the parties present. Should any difficulty arise, the tribunal is authorized to defer the judgment for five useful days. The parties must be notified of the complete text of the judgment as soon as possible. This second judgment has the most important effect of the *restitutio in integrum*, namely, the devolative effect. The cause returns *ad pristinum statum* and the judge has again judged on the merits thereof and has made a definitive judgment. The acts performed based on the judgment being challenged have been annulled, and this new judgment decides the substance of the cause, and also on the obligation to restore and repair any damage incurred.

At the time in which the judgment is notified to the parties, or to the procurators through the delivery of a copy, the time for possible challenges of the judgment begin to run (cf. cc. 1614–1615). The appeal affects the judgment being rescinded as well as the one being reinstated (cf. c. 1639 § 1).

The judgment will contain the decree of execution (cf. c. 1651). The only provisos for not executing this judgment are that if a new recourse of *resittutio in integrum* has again been filed or if any situation contemplated in c. 1654 takes place. If there is an appeal, execution of the judgment will be suspended, pursuant to c. 1638.

Therefore, in current canonical norms, the revocatory nature, substantial to this juridical institution survives, as opposed to the merely rescisitory nature characteristic of other types of actions, especially the *querela nullitatis*.

TITULUS X
De expensis iudicialibus et de gratuito patrocinio

TITLE X
Judicial Expenses and Free Legal Aid

INTRODUCTION

Enrique de León

In most juridical systems, there is a clear tendency toward the free administration of justice, which in any case is always fully or partially granted to those persons lacking sufficient economic resources to deal with a process in which they are not infrequently obligated to participate against their will.

In the canonical juridical system, no express principle is given affirming a totally free administration of justice. However, it can be said that in fact there is a certain free administration of justice, the nuances of which will be analyzed below.

First we must make a distinction between what is free, understood as a prohibition on judges and ministers of the tribunal from receiving from the parties any kind of economic compensation for the performance of their functions, including any type of gifts (c. 1456) and the payment that the tribunal must collect from the parties for expenses incurred during the process (c. 1649 § 1, 1°). With regard to the first aspect, the administration of justice in the canonical system is, and must always be, free as it is in any juridical system that seeks to maintain the necessary independence of the judges in the exercise of their duties. However, under the second aspect, most juridical systems, including the canonical system, establish some amounts, or some criteria, by which fees will be set to cover the expenses incurred in the normal functioning, and it is logical that these fees should be paid by the persons who incur these expenses. In this case, one cannot speak of a totally free administration of justice, even when, as we shall see, conditions are established by which the payment of said expenses are totally or partially exempted.

In procedural juridical doctrine, which also applies to the canonical process, it is customary to distinguish between two terms, which could be called classic, that refer to different concepts that are not always easy to

distinguish: *costs* and *judicial expenses*. Both refer to the expenses originating in the process. However, while costs are the necessary disbursements required by the process itself (expenses incurred by the court, travel, advocate's fees when their participation is mandatory and expert fees if any, etc.), judicial expenses refer to expenses that either are not strictly necessary or are incurred outside of the process itself although they are directly related to it (fees for optional advocates and procurators, preliminary reports, etc.). This distinction is important in sdetermining what is to be imposed on the party whose claims have been denied.

The *CIC*/1917 devoted nine canons to this matter under one title—with the same heading as the current *CIC*, which in turn had two chapters, the first referred to judicial costs and the second to gratuitous service.

The *CIC* has simplified the regulation of this matter by simply referring it to the bishop, who, as the person responsible for governing the tribunal (cc. 1419 § 1, 1439 § 3), is to legislate and set down specific norms on the points indicated in § 1 of the only canon now in existence.

Nevertheless, the provisions of the *CIC*/1917 can be very useful as guidelines when a point of reference is needed, and therefore to have some uniformity and in this way to avoid major differences between the different tribunals of the same Episcopal Conference, which differences could doubtless give rise to injustice, if not scandal.

On this point, with particular regard to court costs, some countries have already begun to unify their criteria, either establishing scales applicable to the different personal situations, or setting specific amounts according to the type of process.

With respect to gratuitous service, first we must state that it is a typically canonical institution that later was received almost totally in civil jurisdictional systems.

In fact, already at the Council of Carthage in 348, it was established that the ex officio defender for the poor be appointed in order to stand in court against those with means. With Gregory the Great (590–604), the office of the attorney for the poor became a stable and permanent institution until it was received in c. 1916 of the *CIC*/1917.

This figure of the defender of the poor is a direct consequence of free legal service. Thus, when a litigant proved not to have sufficient means to litigate, he or she was exempted from the payment of court expenses and as a result the ex officio defender was appointed to act on his or her behalf in the process.

1649 **§ 1. Episcopus, cuius est tribunal moderari, statuat normas:**

1° de partibus damnandis ad expensas iudiciales solvendas vel compensandas;

2° de procuratorum, advocatorum, peritorum et interpretum honorariis deque testium indemnitate;

3° de gratuito patrocinio vel expensarum deminutione concedendis;

4° de damnorum refectione quae debetur ab eo qui non solum in iudicio succubuit, sed temere litigavit;

5° de pecuniae deposito vel cautione praestanda circa expensas solvendas et damna reficienda.

§ 2. A pronuntiatione circa expensas, honoraria et damna reficienda non datur distincta appellatio, sed pars recurrere potest intra quindecim dies ad eundem iudicem, qui poterit taxationem emendare.

§ 1. The Bishop who is responsible for governing the tribunal is to establish norms concerning:

1° declarations that parties are liable for the payment or reimbursement of judicial expenses;

2° the honorariums for advocates, experts and interpreters, and the expenses of witnesses;

3° the granting of free legal aid and the reduction of expenses;

4° the payment of damages owed by a person who not merely lost the case, but was rash in having recourse to litigation;

5° the money to be deposited, or the guarantee to be given, for the discharging of expenses and payment of damages.

§ 2. No distinct appeal exists from a pronouncement concerning expenses, honorariums and damages. The parties can, however, have recourse within ten days to the same judge, who can change the sum involved.

SOURCES: cc. 1908–1912, 1914–1916; NSRR 164–180, 182–185; PrM 232–236 §§ 1 et 2, 237–240; SN cann. 435–439, 441–444

CROSS REFERENCES: cc. 1456, 1464, 1488 § 1, 1490, 1523, 1525, 1571, 1580, 1595, 1611, 4°, 1636 § 1

COMMENTARY

Enrique de León

If cc. 1908–1916 of the *CIC*/1917 are compared to the only canon that is currently in force which regulates all issues concerning judicial expenses and gratuitous service it can be appreciated that it is an important change. This is because the current *CIC* gives the bishop, as the moderator of the tribunal, the mandate to issue norms on the issues indicated in § 1, most of which were regulated in the *CIC*/1917 without the possibility of later specificity.

Therefore, in order to avoid the risk of excessive divergence in the particular legislation in a matter as important as access to the means that the Church makes available to the faithful for the just defense of their rights and interests, (all without detriment to the necessary autonomy set forth in this c. 1649), the following, among other factors, should be taken into account when this legislative task is undertaken:

a) the rest of the norms of the *CIC*, insofar as in some cases it delimits the scope of the application of the legislative power in this specific matter;

b) the norms that were previously in force, which on many occasions not only continue to be fully used in practice and, in general, successfully, but also constitute, together with accumulated experience, a significant point of reference;

c) and, lastly, the characteristics of each territory should also be taken into account in order that the resulting norms be adapted as much as possible to the needs of each diocese.

Canon 1908 of the *CIC*/1917, when it stated that "in contentious cases, the parties can be ordered to pay something along the line of judicial expenses" (provided that they are not exempt from this payment according to cc. 1914–1916), it almost established a pronouncement of free justice. This is because in fact it authorized the tribunal to collect a sum along the line of costs, but did not force it to, and only in "contentious" cases, not in criminal cases.In the *CIC*, however, even when it refers the regulation to the bishop, between c. 1611, 4°, which establishes that every judgment must make a finding regarding litigation costs, and no. 1° of this canon, it does not seem to leave much room for establishing the free administration of justice, outside of what is determined according to no. 3° of this same canon. One cannot even speak of free justice in penal cases, because c. 1728 § 1 refers to the norms of the ordinary contentious process without establishing any exemption with regard to judicial costs.

Due to the foregoing, with respect to § 1, 1° of the canon, it can be concluded that what the bishop really must establish are the criteria by which the tribunal of his diocese is to impose the payment of costs or reimbursement, as applicable.

In connection with the payment of expenses, c. 1595 seems to implicitly impose a limitation on the legislative power of the bishop, because the party that is absent from the proceeding and does not show just cause must be ordered to pay costs. With respect to reimbursement, c. 1911 of the *CIC*/1917 is still most helpful in assessing the various situations in which this compensation can be applied. With respect to costs incurred because of expiration or withdrawal, either in the process or in the appeal, the provisions of cc. 1523, 1525, and 1636 § 1 must be taken into account.

In § 1, 2°, we find a series of concepts that, as we anticipated, are not easy to delimit.

We have the honorariums for advocates that, when their intervention is mandatory, are considered judicial "costs" and not expenses. However, the honorariums of the procurators, in principle, cannot be considered judicial "costs" because their intervention is not expressly provided as mandatory, according to the provisions of c. 1481. It will only be mandatory when, according to § 1 of this canon, the judge deems it necessary.

Then, still within § 1, 2°, mention is made of the honorariums of experts and interpreters, as well as compensation for witnesses that are to be considered as judicial costs, because they are necessary expenses in the process.

The free legal service regulated in § 1, 3, which together with judicial expenses gives the name to this title, is intended to facilitate access to the courts for those persons who, because of insufficient economic means, would be deprived of judicial protection. Therefore, it consists of full exoneration from the duty to pay judicial costs. Their reduction, which is also mentioned in no. 3°, is to be deemed partially free legal service. The request for gratuitous service must be made at the beginning of the process and will be decided before the "*litis constestatio*," according to the provisions of c. 1464. If a situation arises that a party experiences destitution, that is, after the "*litis contestation*," the said request may be made at any point in the process.

The criteria by which the appropriateness of granting said benefit is judged, be it full or partial, are at the full discretion of the Bishop who governs the tribunal. Moreover, some coordination with the various tribunals of a same Episcopal Conference is necessary in order to avoid possible complaints resulting from comparisons.

Just as in § 1, 1° of c. 1649 the possibility is open for the losing party to be ordered to pay costs (in c. 1910 of the *CIC*/1917 that order was mandatory), § 1,4° sets forth payments of damages owed by the party that not only lost the case, but also was rash in having recourse to litigation. Pursuant to no. 4°, it is left to the discretion of the bishop to establish when it is deemed that there has been rashness and the amount of damages to be paid. Once the existence of said rashness is declared, the losing party is automatically ordered to pay.

With respect to § 1, 5°, it seems logical that in view of the well-founded possibility that a party can avoid his or her obligation to pay costs or damages in the event it is so ordered or it has litigated rashly, respectively, the court may ask in advance for a deposit of money or a guarantee at the beginning of the process. In any event, it will be each tribunal that will decide the appropriateness of this measure in each case.

Lastly, § 2 is a repetition of the provisions of c. 1913 § 1 of the *CIC/*1917, extended to include two more monetary items: honorariums and payment of damages. In fact, an appeal is not granted separately against the pronouncements of the judge on said items and costs. That is for two reasons:

a) because that pronouncement of the judge, considered independently of the main case, is rather administrative in nature, such that the only recourse against it is before the same judge or tribunal;

b) we find the second reason in § 1 of the same canon: if it is the bishop, as the moderator of the tribunal, who is to issue norms precisely on these matters, it is not conceivable how a court of appeals could decide separately on the pronouncement of costs, honorariums, and payment of damages. It would entail applying norms that are only in force in the territory of the tribunal whose decision is being appealed.

In the current regulation, the time limit for an appeal before the same judge or tribunal is extended to fifteen days.

TITULUS XI
De exsecutione sententiae

TITLE XI
The Execution of the Judgment

INTRODUCTION

Enrique de León

1. *The meaning of the execution of the judgment*

When a process is initiated before an ecclesiastical tribunal, the Church, through the judges and tribunals, exercises primary protection of the rights considered therein by the mere act of initiating the process and proceeding until pronouncement of the judgment. Many times the requested total jurisdictional protection is furnished when a declarative judgment is pronounced, that is, with a mere acknowledgment of the existence of the right that was questioned. It is also furnushed when the judgment creates, modifies or extinguishes a given juridical relationship or situation, and this is what is known as a "constitutive judgment." Some protection is even created in the most frequent case of condemnatory judgments even before proceeding to the execution, by the mere act of recognizing the claims of the party who lodged the petition.

However, this protection or safeguard is not sufficient if, after the judgment is given, more proceedings do not take place that would lead the content of the ruling to adapt to reality. This adaptation is almost automatic in the case of judgments ending "declarative" and "constitutive" processes, because the protection requested, if it is recognized in favor of the petitioner, is completely realized when a favorable judgment is obtained. The effect is "almost" automatic, because in both types of processes occasionally complementary proceedings are needed to really make effective the desired and recognized protection.

In processes that end with a condemnatory judgment, however, the judgment by itself is usually not sufficient for effective protection of the rights and interests, the protection of which was requested. It is true that from that moment on the juridical situation of the petitioner is substantially different, from the situation in which he or she was at the beginning

of the process that ends with a condemnatory judgment, now the petitioner has a right not possessed before. However, his or her factual situation is still the same if after the condemnatory judgment the respondent does not comply, or voluntarily executes, that which he or she has been cnvicted, because now (as before the process began), he or she is not allowed any way to personally exercise that right.

In view of the foregoing, for the order of the judgment to have practical efficacy, proceedings are established designed to make the respondent, once convicted, effectively perform the act that he or she was ordered to perform in the judgment. All of these regulated proceedings are called the *execution of the process*. That is why execution can only be properly referred to when, for the reasons already set forth, it is necessary to initiate the process of the same name. In the case in which the respondent voluntarily "executes" the judgment, it would be "improper execution."

2. *Juridical nature of the process of execution*

The juridical nature of the process of execution is not a matter of mere erudition, but of practical importance, because if we have an administrative process, or if we have a judicial process, its efficacy depends on the execution process.

In the canonical system, pursuant to the norms regulating it to which we will refer below, the execution process has a marked administrative character:

— Whereas, it is considered an autonomous process separated in its development from the main case in which it originated;

— it is not the judge or tribunal that pronounced the condemnatory judgment that must proceed to execution, but the bishop, either personally or through someone else (c. 1653 § 1).

The practical consequence of this separation, and of this administrative character of execution, is manifested in the possibility to obstruct the execution itself because it is not the same authority who hears and who executes. In fact, the establishment of a mechanism for correction in c. 1653 § 2 implies an express knowledge of this eventuality.

3. *Which judgments are executable*

From the content of the present title it appears that only judicial judgments that end a hearing process are susceptible to execution. However, with regard to the rest of the possible rights to execution, it is necessary to distinguish if they are interlocutory judgments and decrees, or other executory rights.

In the first case, taking into account that cc. 1613 and 1618 attribute to interlocutory judgments and decrees the same force as the definitive judgment, it seems that the present provisions on execution are fully applicable to interlocutory judgments, and decrees, provided that they have become adjudged matters (cf. cc. 1641 and 1650 § 1).

With regard to other possible executory rights, in that there is no reference to them, it must be deemed that they cannot be the object of this execution process if they have not been previously subjected to a hearing process (more or less brief), that ends with a condemnatory judgment.

1650 **§ 1. Sententia quae transiit in rem iudicatam, exsecutioni mandari potest, salvo praescripto can. 1647.**

§ 2. Iudex qui sententiam tulit et, si appellatio proposita sit, etiam iudex appellationis, sententiae, quae nondum transierit in rem iudicatam, provisoriam exsecutionem iubere possunt ex officio vel ad instantiam partis, idoneis, si casus ferat, praestitis cautionibus, si agatur de provisionibus seu praestationibus ad necessariam sustentationem ordinatis, vel alia iusta causa urgeat.

§ 3. Quod si sententia, de qua in § 2, impugnetur, iudex qui de impugnatione cognoscere debet, si videt hanc probabiliter fundatam esse et irreparabile damnum ex exsecutione oriri posse, potest vel exsecutionem ipsam suspendere vel eam cautioni subicere.

§ 1. A judgement which becomes an adjudged matter can be executed, without prejudice to the provision of can. 1647.

§ 2. The judge who delivered the judgement and, if there has been an appeal, the appeal judge, can either ex officio or at the request of a party order the provisional execution of a judgement which has not yet become an adjudged matter, adding if need be appropriate guarantees when it is a matter of provisions or payments concerning necessary support. They can also do so for some other just and urgent reason.

§ 3. If the judgement mentioned in § 2 is challenged, the judge who must deal with the challenge can suspend the execution or subject it to a guarantee, if he sees that the challenge is probably well founded and that irreparable harm could result from execution.

SOURCES: § 1: c. 1917 § 1; SN can. 445 § 1
§ 2: c. 1917 § 1,1°; SN can. 445 § 2,1°
§ 3: c. 1917 § 2,2°; SN can. 445 § 2,2°

CROSS REFERENCES: cc. 1638, 1641, 1643, 1644 § 2, 1647

COMMENTARY

Enrique de León

1. It is a general rule applicable in every process of execution that the condemnatory judgment, or judicial resolution intended to be executed, must have become an adjudged matter. This is established in § 1 of this canon, which also sets forth the first exception to the general

provision just stated. This is that, if a final judgment, which therefore has acquired the force of an adjudged matter, has not yet been executed nor has the execution process begun, when the recourse of *restitution in integrum* is lodged, it cannot be executed until said *restitution in integrum* is resolved (c. 1647 § 1), unless the judge hearing the recourse finds it likely that the petition for *restitutio* has been presented to delay the execution, in which case he or she can order that the judgment be executed, adopting due guarantees in the event that *restitution in integrum* is granted (c. 1647 § 2).

2. Paragraph 2 of the canon establishes a situation that in turn constitutes an exception, either to the general rule mentioned in § 1 or to the general rule formulated in c. 1638. According to this latter canon, "an appeal suspends the execution of the judgment." This is one of the two effects that are usually produced by the lodging of the appeal: suspending execution (c. 1638) and *in devolutivo* (c. 1628). But by virtue of the exception contained in § 2, the judge who pronounced the judgment in the first instance as well as the appellate judge may order ex officio or at the request of a party "provisional execution" of a judgment provided that:

a) the judgment has ordered the payment of provisions or ordinary payment for necessary support;

b) there is another urgent and just reason such that if the judgment was not provisionally executed, it could result in prejudice greater than the prejudice that would result with an execution that would later prove to be wrong. In any event, in order to foresee this possible prejudice, a consequence of provisional execution, the last part of § 2 provides the need to adopt the appropriate guarantees.

3. Clear evidence of the prudence with which the option granted in § 2 of this canon should be used is given by § 3, which constitutes, in turn, an exception within an exception.

In fact, if once a judgment is pronounced that orders provisions or payment for necessary support or for another urgent and just cause, its provisional execution is decreed by the judge *a quo* and then the appeal is lodged, the judge *ad quem* of the appeal can suspend said execution if he believes that the challenge to the judgment is probably well-founded and that, consequently, execution could result in irreparable damage. The same judge has this same faculty when, after decreeing the same provisional execution, he realizes that the challenge will probably be successful. Adding the furnishing of a guarantee at the end seems repetitive and unnecessary, because it is already provided in § 2 as an indispensable condition for provisional execution, when necessary.

4. Canon 1644 § 2 has an explicit reference to § 3 of this canon, when it speaks of whether or not judgments pronounced in causes on the status of persons have the force of an adjudged matter. According to the provisions of c. 1643 ("cases concerning the status of persons never become an

adjudged matter"), judgments rendered in said processes are not susceptible to execution because they lack the necessary force of an adjudged matter. Nevertheless, it should be born in mind, above all, that said judgments usually are declarative or constitutive. Therefore they do not properly require execution, but rather, when applicable, the supplemental proceedings (*vide* introduction to the title) that are necessary to render effective the right or interest of the petitioner. However, even in the event that we have a condemnatory judgment, this judgment is with no doubt liable to execution, as evidenced in the exact wording of c. 1644 § 2: "recourse to a higher tribunal to obtain a new presentation of the case *does not suspend the execution of the judgment* ..." Therefore, in short, if when a "new presentation of the case" is lodged, the judgment has already been executed, it makes no sense to speak of suspension of the execution, because it is impossible. And if it is lodged with an execution pending, the criteria established in this § 3 for cases of ordinary appeal of a judgment, as c. 1644 §2 provides, will apply. In our opinion, it would be more correct to refer to c. 1647, because in both cases, it is an extraordinary recourse.

1651 **Non antea exsecutioni locus esse poterit, quam exsecutorium iudicis decretum habeatur, quo edicatur sententiam ipsam exsecutioni mandari debere; quod decretum pro diversa causarum natura vel in ipso sententiae tenore includatur vel separatim edatur.**

Execution cannot take place before there is issued the judge's executing decree directing that the judgement be executed. Depending on the nature of the case, this decree is to be either included in the judgement itself or issued separately.

SOURCES: c. 1918; SN can. 446

CROSS REFERENCES: cc. 1684, 1685

COMMENTARY

Enrique de León

Judicial activity in the canonical process does not end with the judgment that concludes the process, either in the first or the second instance. Without getting into the execution process itself (which, as will be seen, the *CIC* entrusts to the bishop of the place in which the judgment was pronounced), it falls upon this judicial activity to order that the judgment be executed. Without this mandate, the judgment cannot be executed even if it is a final judgment.

It is also provided that this execution order must be in the form of a "decree" that, depending on the nature of the case, may be directly included in the judgment or be pronounced separately.

In causes for the declaration of the nullity of marriage, the question arises as to when the judgment is executable: when the decree of execution is made or "when there is notification of a decree or new judgment," declaring the nullity of the marriage, as provided in c. 1684 § 1. It is not logical to speak properly of "execution" in these causes, because there is no penalty. In any event, the proceedings provided in c. 1685 must be carried out, which are those that, according to other opinions, constitute the matter of execution. But is it necessary to wait until the respective notations are made in the marriage and baptism registers in order to deem the judgment is executed? The simplest solution is to always include the executory decree in the judgment or decree of confirmation in order that the respective notations may be made within a reasonable time.Until these notations are made, however, neither of the two parties may in fact remarry, because he or she will still be seen as married in the registers according to the previous notation.

1652 **Si sententiae exsecutio praeviam rationum redditionem exigat, quaestio incidens habetur, ab illo ipso iudice decidenda, qui tulit sententiam exsecutioni mandandam.**

If the execution of the judgement requires a prior statement of accounts, this is to be treated as an incidental question, to be decided by the judge who gave the judgement which is to be executed.

SOURCES: c. 1919; SN can. 447

CROSS REFERENCES: cc. 1587–1591

COMMENTARY

Enrique de León

Before proceeding to the execution of the judgment, or during the execution process, it may be noted that it is necessary to proceed to a rendering of accounts without which said execution would not be possible. In this case, a new hearing proceeding must be carried out. Therefore it is a judicial action, which exceeds the functions of the executor. Thus the canon defers to the same judge who pronounced the judgment, in order that he or she decide in a brief proceeding, (referred to in cc. 1587–1591), the issue that was raised. Evidently, if execution has already begun, it is suspended as long as the incidental matter on which execution itself depends is presented and resolved.

1653 **§ 1. Nisi lex particularis aliud statuat, sententiam exsecutioni mandare debet per se vel per alium Episcopus dioecesis, in qua sententia primi gradus lata est.**

§ 2. Quod si hic renuat vel neglegat, parte cuius interest instante vel etiam ex officio, exsecutio spectat ad auctoritatem cui tribunal appellationis ad normam can. 1439 § 3 subicitur.

§ 3. Inter religiosos exsecutio sententiae spectat ad Superiorem qui sententiam exsecutioni mandandam tulit aut iudicem delegavit.

§ 1. Unless particular Law provides otherwise, the Bishop of the diocese in which the first instance judgement was given must, either personally or through another, execute the judgement.

§ 2. If he refuses or neglects to do so, the execution of the judgement, at the request of an interested party or ex officio, belongs to the authority to which the appeal tribunal is subject in accordance with can. 1439 § 3.

§ 3. Between religious, the execution of the judgement is the responsibility of the Superior who gave the judgement which is to be executed, or who delegated the judge.

SOURCES: § 1: c. 1920 § 1; SN can. 448 § 1
§ 2: c. 1920 § 2; SN can. 448 § 2
§ 3: c. 1920 § 3; SN can. 448 § 3

1654 **§ 1. Exsecutor, nisi quid eius arbitrio in ipso sententiae tenore fuerit permissum, debet sententiam ipsam, secundum obvium verborum sensum, exsecutioni mandare.**

§ 2. Licet ei videre de exceptionibus circa modum et vim exsecutionis, non autem de merito causae; quod si habeat aliunde compertum sententiam esse nullam vel manifeste iniustam ad normam cann. 1620, 1622, 1645, abstineat ab exsecutione, et rem ad tribunal a quo lata est sententia remittat, partibus certioribus factis.

§ 1. The executor must execute the judgement according to the obvious sense of the words, unless in the judgement itself something is left to his discretion.

§ 2. He can deal with exceptions concerning the manner and the force of the execution, but not with the merits of the case. If he has ascertained from some other source that the judgement is null or manifestly unjust according to cann. 1620, 1622 and 1645, he is to refrain from executing the judgement, and is instead to refer the matter to the tribunal which delivered the judgement and to notify the parties.

SOURCES: § 1: c. 1921 § 1; SN can. 449 § 1
§ 2: c. 1921 § 2; SN can. 449 § 2

CROSS REFERENCES: cc. 17, 1439 § 3, 1620, 1622, 1645

COMMENTARY

Enrique de León

1. Canons 1653 and 1654 discuss respectively the questions of who must carry out execution and the manner in which it is done. Canon 1920 of the *CIC*/1917 provided almost exactly what is set forth in § 1 of c. 1653, but now two important innovations have been introduced:

a) Whereas, the reference made to particular law ("unless particular law provides otherwise"), must be taken into account, because "something else" totally different from what is in § 1 may be decided; this aspect is not at all insignificant;

b) however, instead of referring as before to the "local Ordinary," it is expressly stated that it is the bishop of the diocese, in which the judgment was pronounced in first instance, who orders execution of the judgment personally or through another.

The fact that it is the diocesan bishop who executes the judgment and not the judge who pronounced it, demonstrates the administrative and not the judicial nature (*vide* the introduction to the title) attributed to the execution phase in canon law, which has become more evident in the new Code. In the event that it is the judicial Vicar or the judge himself who executes the judgment, which can occur, it means that in both cases they have received express delegation from the diocesan bishop, but the judicial action does not continues in the execution.

2. Paragraph 2 of c. 1653 also provides for the possibility that was already considered in the *CIC*/1917 in which the bishop refuses or is negligent in the execution of the judgment. Evidently, when § 2 states "if he

refuses," it is not referring to the person whom the diocesan bishop has delegated for execution of the judgment, but the diocesan bishop himself. And in this case, a mechanism is applied which bears some similarity to the devolative effect of the appeal, thus the reference to c. 1439 § 3 referring to tribunals of second instance. Execution, either ex officio or at the request of a party, is transferred to the authority to which the tribunal of appeal is subject.

Regarding this latter point, it must be noted that by now referring to the "authority to which the appeal tribunal is subject," instead of the appellate judge doing it directly, as stated in c. 1920 § 2 of the *CIC*/1917, the question arises as to who is considered to be the authority in the case of the Tribunal of the Roman Rota and of the Tribunal of the Rota of the Apostolic Nunciature in Spain.

3. With respect to the manner in which execution is carried out, § 1 of c. 1654 sets forth the criterion that c. 17 establishes for interpreting law, that is, (according to the obvious sense of its words), unless the judgment itself has left something to be interpreted at one's discretion. If, as stated previously, the judicial activity ends with the executory decree or, if applicable, with the resolution of any incidental matters that may arise during execution, but in any event cannot be extended to execution, for its part, the administrative activity that entails execution cannot invade an area that does not belong to it, such as the hearing function that belongs exclusively to the judicial function. That is why the canon establishes precise limits within which execution must be performed, leaving open the possibility that the judge him- or her -self has ceded some specific aspect to the discretion of the executor.

However, it seems clear that if the executor in some case refuses to execute the judgment, he must do it for a good reason. That is why if, when executing a judgment, he finds that the judgment is null or manifestly unjust, not only can he refuse, but he must abstain from executing it and send the matter to the tribunal that pronounced the judgment, notifying the proper parties. This is provided in § 2 of c. 1654 and should also be included in the first assumption of c. 1653 § 2, "if he refuses," omitting this phrase that on the other hand must be understood to be included in the following "or neglects to do so." In any event, the provisions of § 2 of c. 1654 must, as the canon itself indicates, comply with the provisions of cc. 1620, 1622, and 1645.

4. Paragraph 3 of c. 1653 indicates that, between religious, execution of the judgment devolves in any event upon the Superior, either the Superior who pronounced the judgment or another delegated judge appointed by him. As a result, we understand that the criteria established in c. 1654 are not strictly applicable, because in more than a few cases, the judge and the executor are the same person.

1655 **§ 1. Quod attinet ad reales actiones, quoties adiudicata actori res aliqua est, haec actori tradenda est statim ac res iudicata habetur.**

§ 2. Quod vero attinet ad actiones personales, cum reus damnatus est ad rem mobilem praestandam, vel ad solvendam pecuniam, vel ad aliud dandum aut faciendum, iudex in ipso tenore sententiae vel exsecutor pro suo arbitrio et prudentia terminum statuat ad implendam obligationem, qui tamen neque infra quindecim dies coarctetur neque sex menses excedat.

§ 1. In real actions, whenever it is decided that a thing belongs to the plaintiff, it is to be handed over to the plaintiff as soon as the matter has become an adjudged matter.

§ 2. In personal actions, when the respondent is condemned to hand over a movable possession or to pay money, or to give or do something, the judge in the judgement itself, or the executor according to his discretion and prudence, is to assign a time-limit for the fulfilment of the obligation. This time-limit is to be not less than fifteen days nor more than six months.

SOURCES: § 1: c. 1922 § 1; SN can. 450 § 1
§ 2: c. 1922 §§ 2 and 3; SN can. 450 §§ 2 et 3

CROSS REFERENCES: cc. 1410, 1652

COMMENTARY

Enrique de León

This tit. XI, dedicated to execution of the judgment, and sec. I of part II of Book VII, dedicated to the ordinary contentious process, concludes with the setting of time-limits in which obligations imposed on the respondent by the judgment must be complied with.

If the penalty contained in the judgment directly involves a real action (cf. c. 1410), that is, there is a penalty imposed to hand over a thing, be it movable or immovible, albeit always derived from a real action, this thing must be handed over to the petitioner immediately as soon as the judgment acquires the force of an adjudged matter. If it is not handed over, execution of the judgment will be requested. In the hypothetical situation in which the litigated thing could not be handed over, because it has been

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§ 2. In personal actions, when the respondent is condemned to hand over a movable possession or to pay money, or to give or do something, the judge in the judgement itself, or the executor according to his discretion and prudence, is to assign a time-limit for the fulfilment of the obligation. This time-limit is to be not less than fifteen days nor more than six months.

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destroyed or its delivery is physically impossible, the respondent would have to hand over to the petitioner its price established in advance by an expert, for which the avenue established in c. 1652 for the statement of accounts before execution may be followed.

If, however, the penalty consists of obligations resulting from personal actions, such as for example the payment of a sum of money or giving something, (if it is a movable thing it must derive from a personal act), then the time-limit for its voluntary compliance must be established, which will never be less than fifteen days nor more than six months. Said time-limit will be set by the judge in the judgment, or the executor, according to his discretion and judgment, at the beginning of the executive action.

SECTIO II
De processu contentioso orali

SECTION II
The Oral Contentious Process

INTRODUCTION
Luis Madero

1. *Origin and nature of the oral contentious process*

With the oral contentious process, the canonical legislator has intended to introduce a new type of process, quite different from the ordinary contentious process treated in the previous section. This constitutes one of the principal innovations that the Code offers in relation to the former Code regarding the procedure.

The members of the Commission for the revision of the Code were inspired by the process regulated in cc. 453 to 467 of the *Motu proprio De iudiciis pro Ecclesia Orientali*,[1] and by the indirect method in the summary process which established a new process that is much more flexible and without the excessive formalities which characterized the process of the *Ordo Solemnis Iudiciorum*. This latter work, dominated by the procedural principle of writing with all of its corollaries (preclusion, mediation, division into different phases, longer time limits, etc.), hardly seemed suitable for the requirements for urgency in certain cases (to start with, those enumerated in the Decretal *Dispendiosam*: *Clem.* II, I, 2).

For these types of cases, the decretal *Saepe* ordered the suppression of many of those formalities. It omitted the need for the *libellus supplex*, it disregarded the solemn *litiscontestatio*, time limits were abbreviated, diverse citations and some of the oaths were abolished. This type of process was called upon in order to give recognition to a great development. As a matter of fact, its scope of application was extended little by little to many other cases.[2] It ended up being transformed into what had been the

1. Cf. *AAS* 40 (1950), pp. 98–99.
2. Cf. P. RIDOLPHINI, *De ordine procedendi in iudiciis in Romana Curia Praxis recentior*, 5th ed. (Venice 1703), pp. 7–8.

common process for the canonical tribunal before the promulgation of the *CIC*/1917.[3]

Although there were two *schemata* with which they intended to introduce the modern day division into two parts, the solemn and the oral, the idea did not succeed in the codification of 1917, because, (aside from other reasons), the principles contained in the *Saepe* document had been included within its proper ordinary process.

The juridic nature of the oral contentious process is that of a rapid or accelerated full trial and not that of a summary trial properly so-called, once the initial scope has been presented of the matters which can be recognized and treated by means of this process.

The summary process at the present time is that which refers to some matters that are well determined and concrete. The range of information about these matters demands greater rapidity of procedure, especially because the understanding of the judge is *limited* to a clearly defined procedural object. The judge is constrained to determine the concrete question which is submitted to him, and he must leave other possible implications aside. For this reason, the means of defense and attack are more limited and the solution by the judge takes on a provisional status, since the decision reached in the summary trial can be revised anew in the plenary process. This latter process, the oral contentious trial, on the other hand, does not restrict the procedural means of attack and defense. The question being argued will be treated in an exhaustive manner. The most important difference lies in that the sentence that falls under this type of process—the plenary, as well as under the oral process or the rapid plenary—attains the force of a *res judicata* (a final judgment).

For these reasons, the decision of the members of the *coetus de processibus* (the commission for processes) seems wise in their naming it "oral contentious" and in excluding it from the section for special processes where that section was still in the planning stage.[4] Even though the adopted designation of "oral contentious" might not be adequate from the point of view of the Latin language, it does agree with it, because this process does get its inspiration from the principle of procedural orality with all of its corollaries.

2. *What principles make up the oral contentious process*

The principles that make up the oral contentious process are logically those that are encountered in one way or another as being connected intimately with the principle of procedural orality. This principle consists

3. Cf. CH. LEFEBVRE, "Procedure," in *Dictionnaire de Droit Canonique,* VII, col. 295; M. LEGA, *De Iudiciis Ecclesiasticis,* I (Rome 1898), p. 519.

4. Cf. *Comm.* 11 (1979), pp. 247ff.

primarily in the possibility and convenience by which the procedural acts are executed verbally. The written form, which is mandatory in the ordinary contentious process in accord with the principle of the time-honored wording in c. 1472, is not necessary in this process. This is so even though for some acts there is no inconvenience in having them committed to writing or it might even be that it is obligatory to put them into writing, as is the case with the petition.

Strictly connected to the principle of orality one encounters the principle of the physical proximity of the judge to the parties, to the witnesses, and to the expert witnesses, because the majority of the processual interventions are accomplished in the presence of the judge during the hearing. This principle is completely in contrast to the principle of mediation which permits a dissociation between the judge who is to judge the case and the judge who instructs it. This possibility is clearly admitted in the ordinary contentious process as is deduced from c. 1428. The figure of the judge instructor is severely criticized by the authors who are inclined to favor orality in the process, since the work of the judge instructor is incompatible with the principle of proximity. The advantages of proximity are great, because the same judge who decides the case must assist personally at the hearing, facilitating thereby a direct assessment of the proofs.

The principle of proximity also implies the need to maintain the principle of the identity of the judge all during the process. This supposes that, save for the rarest exceptions, no change of judge should be effected as provided for in c. 1425 § 5. Normally, there must not be any reason for a case that would justify the substitution of the judge, since the period of time foreseen to resolve the question is quite short.

The necessary consequence of the principle of orality is the principle of procedural concentration, which demands that all the proofs be made within one or two hearings. In the ordinary contentious process, because of its predominantly written character and because of its division into different steps or preventive phases, there is a tendency to spread out the interventions and to take more time. The result is that it is impossible to include all the interventions within the hearing. At the same time, this division into preclusive phases has the effect that, once the time limit has passed to conclude a determined procedural act, such a step cannot be completed because the act exceeded the time period provided for it (this is what is known as the principle of procedural preclusion). Note, however, that, because of the influence of the principles from the decretal *Saepe* in the ordinary canonical process, a rigid application of preclusion does not exist.In the oral contentious process, we also find some peremptory time periods which are not allowed to support a certain preclusion, as we shall see in more detail.

The principle of non-appealability from interlocutory decisions, which is considered by the defenders of orality as something of vital importance in favoring the principle of procedural concentration and the

identity of the judge, is not found expressly recognized in the regulation of oral contentious law. In the mp *De iudiciis pro Ecclesia Orientali*, c. 465, this precept was included: "Sententiae interlocutoriae a iudice unico prolatae impugnari nequeunt nisi una cum sententia definitiva admissis." However, in the *CCEO*, one does not encounter a precept like this. Perhaps the reason is that it is difficult for interlocutory sentences to be pronounced in this type of process. But the possibility must not be excluded, especially if reference has been made to questions about the admissibility of the petition. In these cases, the general discipline of c. 1629, 4°, will have to be applied.

1656 **§ 1. Processu contentioso orali, de quo in hac sectione, tractari possunt omnes causae a iure non exclusae, nisi pars processum contentiosum ordinarium petat.**

§ 2. Si processus oralis adhibeatur extra casus iure permissos, actus iudiciales sunt nulli.

§ 1. The oral contentious process dealt with in this section can be used in all cases which are not excluded by law, unless a party requests the ordinary contentious process.

§ 2. If the oral process is used in cases other than those permitted by the law, the judicial acts are null.

SOURCES: *SN* cc. 453–467

CROSS REFERENCES: cc. 1425 § 1, 1°, 1590 § 1, 1627, 1631, 1669, 1671–1691, 1693 § 1, 1697–1707, 1709–1710, 1728 § 1

COMMENTARY

Luis Madero

I. THE EXTENT OF THE APPLICATION OF THE ORAL CONTENTIOUS PROCESS

The general norm established in c. 1656 clearly determines the extent of the application of the oral contentious process. In principle, all those cases that are not excluded by law can use this process. One can readily suppose that there are many different types of cases that can be heard following this shorter and more economical process.

1. Cases excluded by universal law

a) Cases declaring the nullity of marriage

Canon 1690 is exhaustive: "Cases declaring the nullity of marriage cannot be treated in an oral contentious process." We are facing an absolute prohibition. The "special" process of the declaration of nullity as regulated in cc. 1671–1691 must always be followed. The last of these canons mandates that whatever is established in the norms of the code referring to processes in general, and to the ordinary contentious process must be adhered to.

The causes for a declaration of nullity that are based on the assumption that the nullity of the marriage can be proved through documents have their own special process, as stipulated in cc. 1686–1688. They treat a procedure that is faster than the oral contentious process, and which can be called a summary documentary process.

The administrative procedure for the dispensation called "*super rato*," also has its own particular process due to its specific nature. It must follow the necessary norms established in cc. 1697ff, and the special norms of the Holy See. The same situation happens in the process of declaring the presumed death of one of the spouses (c. 1707).

The reason for excluding cases of this type is to be found in the special importance held in the canonical procedure safeguarding the marriage bond. In this respect, the relator of the *Coetus de processibus*, in his response to some suggestions made by one member of the consultors about permitting the use of the oral contentious process in matrimonial cases in general,[1] explained that its prohibition was based fundamentally on the danger which a sudden and serious change would entail in introducing it for use by tribunals. This situation would come about not only because of the brevity of the oral process, but also because, of the simplification of marriage laws in the latest reorganization of the norms of the ordinary trial.

b) Causes of nullity of holy orders

Causes for the declaration of nullity of the bond of sacred orders are also excluded by the universal law. These can be treated judicially or extra-judicially (c. 1709). When they are being processed judicially, c. 1710 states that " … the canons concerning trials in general and the ordinary contentious trial are to be observed." This mandate apparently and effectively excludes this type of cases from the oral contentious trial. The last canon cited adds: "unless the nature of the matter precludes it." This would permit one to think of some circumstance in which the vitiation of the nullity of an order is deduced from a reliable document. In this instance, one would well imagine that proceeding through the ordinary process would be superfluous. The normal procedure in this last case would be administrative.

To this legal argument there must be added the fact that c. 1425 § 1, 1°, in establishing that this type of case must be heard by a collegiate tribunal of three judges, also implicitly excludes proceeding by means of the oral contentious trial.

c) Penal cases

A similar exclusion from the scope of the oral process is made in the conclusion of c. 1728 § 1, using a formula similar to that of c. 1710: "Salvis praescriptis canonus huius tituli, in judicio poenali applicandi sunt, nisi

1. Cf. *Comm.* 11 (1979), p. 271.

rei natura obstet, canones de iudiciis in genere et de iudicio contentioso prdinatio." Consequently, penal cases are excluded. It is the same with matrimonial cases. There were some concrete proposals, on the part of some members of the *coetus de processibus*, according to which the norms of the oral contentious process would be applied to penal cases. The response to this was: "Consultoribus non placet haec propositio, quia in casu urgentis necessitatis procedi potest per decretum extrajudicium."[2] This briefer procedure was treated within the bounds of c. 1720.

Moreover, from the exclusion of these cases by the universal law, one might even think that other types of cases can be excluded by particular law.

2. Facultative character of this procedure

The last clause of the first paragraph of the canon which we are commenting on clearly established that the oral contentious process can be used except where one of the parties requests that the ordinary contentious process be followed. Therefore it is the choice of either of the parties, the petitioner or the respondent.

The same right to ask that the case be heard through the ordinary contentious process exists for public parties, if it is through a determination of the law or of the ordinary that they take part in the process. The reason is evident, because the canon does not distinguish between public and private persons, so that either one of these can make this petition to the judge, who will see for himself whether or not he is obliged to follow the steps of the ordinary contentious process.

3. Cases that the CIC expressly refers to the oral contentious process

a) Canon 1693 § 1 allows for the cases of matrimonial separation, when being handled procedurally, to be heard following the steps of the oral contentious process. However, it also allows the parties the freedom to ask that the ordinary contentious process be followed. If neither of the parties chooses an option that the *CIC* grants, the judge will have to hear the case following the oral contentious process, since he is not able on his own authority to decide upon a change of process.

b) For so-called incidental cases, when they have to be treated with a certain thoroughness and the judge decides that in a determinate case the matter must be resolved by means of an interlocutory sentence, c. 1590 § 1 prescribes that the norms of the oral contentious process have to be observed, although it can happen that "attenta rei gravitate aliud iudici

2. *Comm.* 12 (1980), p. 199.

videatur." Therefore it remains up to the discretion of the judge to determine what is to be treated in one manner or another. Logically, if the incidental matter is of such a nature that it will be necessary to treat it in accord with the ordinary contentious process, then the judge will have to decree that it be treated in this manner. In these cases, in addition to that of an incidental matter (according to cc. 1587–1591), one would deal with the preliminary matter of a prejudicial character. This action would require it to be resolved in an independent process, subject to being declared as a dilatory exception by the party, or warranting the judge to resolve it ex officio in conformity with c. 1459. Whenever both processes interfere with each other, this having arisen through incidental matters, although each has its own proper autonomy for what has already been transmitted, the connection can justify the proroguing of competence in favor of the judge of the first process, but never for their combined harmony (c. 1414). When presenting the ordinary process as prejudicial to the matter that is subject to the oral procedure, the judge can stop the first process until he has firmly resolved the pre-judicial matter that had been brought up.

The difficulty, however, in the extending of competence can proceed principally from the constitution of the tribunal, which can require by legal imperative a collegiate tribunal for the ordinary process (c. 1425 § 1). In such a case, it would not be possible to prorogue the competence because c. 1620, 2° prohibits it under the threat of irremediable nullity. The processes will then be treated separately, without prejudice to the fact that the tribunal, which utilized the ordinary process under the belief that the cause in which it is included is pre-judicial to that which is treated in the oral process, would demand a decree of the judge of the first hearing by reason of connection. This is done for the purpose of placing all the matters which are outlines in any step and norm of the ordinary process before the tribunal. If a matter is raised about competence between tribunals, it will be resolved in conformity with c. 1460. While not every litigious matter suitable for being judged in an ordinary trial can be tried through the oral contentious process, still, every litigious matter suitable to be judged in the oral process is of course suitable to be judged according to the ordinary process.

c) Canon 1631 expressly consigns the *right of appeal* for the so-called incidental case, to the oral contentious process. The judge has the duty to resolve the matter *most expeditiously.* This makes one believe that the judge could reduce the time periods for the oral contentious trial. This restraint in time does not seem to be practical in any form, especially in those regions in which the distance existing between the tribunal *a quo* and the tribunal *ad quem* is great. To be able to carry out the hearing it might be necessary for the parties to travel to another city, which in many cases is not easy to do. On the other hand, to resolve the matter of the appeal in the affirmative or negative, which is a technical matter, it is sufficient to send the pertinent documents, without a need to call the parties

together for a hearing. The motives outlined in c. 1629 which determine the impossibility of appeal of the sentence are verifiable without a need for a hearing.

d) Canon 1627 states that "the cases concerning a plaint of nullity can be dealt with in accordance with the norms for an oral contentious process." Here there is no difficulty such as exists in the previous case, because, normally, it is the same tribunal which issued the challenged sentence that has competence to resolve the plaint of nullity. Still, it can be requested, according to the cases, that there be a judge different from the one who pronounced the sentence (c. 1624). When the plaint is jointly presented with the appeal, as c. 1625 allows, the most normal procedure is that it be treated following the formalities of the appeal.

From what we have said so far one can deduce that the legislator clearly prefers the ordinary contentious process. Certainly, this offers greater guarantees for being able to arrive at a more just solution, especially in those trials in which one is dealing with the validity or the existence of some sacrament. One sees also that, in practice, the oral process will be little used, because the cases treated in the canonical forum are rare which are not related to the problems of the nullity of marriage. It is sufficient to see the annual statistics of the Holy See in these last years to prove that the immense majority of the cases are matrimonial.

The existence of the contentious administrative tribunals foreseen in the subsequent projections *CIC* might lead one to think that this type of process could be used with great frequency to resolve problems of an administrative nature. Since these tribunals were suppressed, it does not seem that this type of process is destined to have a very wide use.

II. PENALTY OF NULLITY OF PROCESSUAL ACTS

§ 2 contains an explicit penalty of nullity of processual acts when "the oral process is used in cases other than those permitted by law." This means that those judicial acts will be null if the oral contentious process is used when it is prohibited by law or when one of the parties asks of the judge that the ordinary contentious process be used in accord with § 1 of this canon.

Martínez Cavero, having made a careful analysis of this rule and keeping in mind c. 1669, comes to the conclusion that if "the oral contentious process has been used in a case excluded by law the sentence is null (logically with irremediable nullity; c. 1669). Therefore, the judicial acts are incapable of being retroactively validated. What is more, these acts remain null, since they have not been retroactively validated in conformity with c. 1619. If the oral contentious process has been used in a case in

which even one of the parties (or the public prosecutor) has asked that the ordinary contentious process be followed, the sentence is not null because of that heading or ground. If, alternately, it is not null under another heading, (it is simply not null), the judicial acts will or will not be retroactively validated, according to whether or not c. 1619 has come into play. In the supposition that the judicial acts are not retroactively validated, the sentence itself becomes remedially null, because of being based on the null judicial acts which have not been retroactively validated according to the norm of c. 1619 (c. 1622, 5°)."[3]

The party who requested that the case be processed through the ordinary contentious process will have to be attentive and make his or her petition before the judge who is using the oral contentious process against the wishes of the parties, so that it impedes the use of c. 1619. If the party does not do this, it must be understood that in reality the party is renouncing his or her petition, and is agreeing to the fact that the case will be treated in an oral contentious process.

At any rate, it must be kept in mind that when the cases of public interest are treated, as happens with the cases of separation of spouses, there is no retroactive validation of null procedural acts because of the sentence.

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3. M. MARTÍNEZ CAVERO, "El proceso contencioso oral," in *Revista Española de Derecho Canónico* 45 (1988), p. 684.

1657 Processus contentiosus oralis fit in primo gradu coram iudice unico, ad normam can. 1424.

The oral contentious process takes place in the first instance before a sole judge, in accordance with can. 1424.

SOURCES: *SN* can. 453

CROSS REFERENCES: cc. 1424, 1441

COMMENTARY

Luis Madero

This canon stipulates that the oral contentious process should be carried out before a single judge in first instance in accordance with c. 1424, which permits the single judge to be assisted by two assessors. Logically, these assessors fulfill a technical function, as their name indicates, namely, of assessing and giving counsel. The relator of the *coetus de processibus* indicated what was the function of these consultors in this way: "Forsam unicus ille iudex molestam patitur solicitudinem praesertim quando, brevi post finem discusionis, debet sententiam pronuntiare. Ideo praevidetur quoad Vicario Iudiciali dari possint ab Episcopo dioecesano duo assessores tamquam consulentes, clerici vel viri laici probatae vitae et bonae estimationis, qui sessiones participant."[1]

The competent judge is determined according to the general norms of competence established in title I of part. I of book VII, which treats of the competent forum (cc. 1404ff), or with the particular norms for the cases of separation of the spouses (c. 1694).

We have already pointed out that the proper nature of the oral contentious process requires that it be decided by a single judge, who instructs the case, principally during the hearing, and who finally decides the case by means of a sentence. This is a requirement in compliance with the principle of immediacy and the principle of the identity of the judge. However, it is convenient to bear in mind that, in some cases, the competent judge, in order to hear a case in accord with the oral contentious process, will not be the judge of first instance, since one must consider other criteria regarding competence. Consider, for example, the plaint of nullity of the sentence when it has been pronounced by a collegial tribunal. This collegial tribunal would have to be the same tribunal that would have to

1. *Comm.* 4 (1972), p. 62.

resolve the plaint in accordance with c. 1624. Also, in the case where the oral contentious process is used in the resolution of incidental cases, when they are introduced in a case that is being heard by a collegial tribunal, this is the tribunal that is competent to hear the incidental case. We must not forget that c. 1425 § 2 always leaves it in the hands of the bishop, even though the canon is applied to difficult cases or to those of greater importance, to entrust a litigious matter to a collegiate tribunal. This means a greater guarantee and even adds a new guarantee that the oral process will be used favorably, always with justice in mind.

It must be remembered that there are certain matters that must be treated by the Tribunal of the Roman Rota in first instance (cf. c. 1444 § 2), which must always hear the cases collegially. It seems that in this case the oral contentious process might be able to be used with a turnus of three judges or auditors, always preserving the immediacy. The three are obliged to be present at the hearing, if possible, by analogy to what is stipulated in cc. 1449 § 4 and 1677 §§ 1–2. This qualification of immediacy can be met if it is received personally by the president of the tribunal or through the ponens, who are not simply auditors receiving the proofs, but who are members of the tribunal, qualified in this case.

It is interesting to recall that a parallel canon in the *CCEO* was suppressed to avoid these problems (cf. cc. 1334ff, *CCEO*). Observe that this process was designated to be "*coram iudice unico*" and actually came to be called a "*iudicio summario.*"

The composition of the tribunal in the second instance is the same as that for the first instance (cf. c. 1441). Therefore the normal situation will be that, if the case is tried before a sole judge in the first instance, it also should be treated the same way in the second instance, and this will also favor the principle of immediacy. When the judge is assisted by two assessors, it seems logical that in the second instance the individual judge should also be assisted by two assessors.

1658 **§ 1. Libellus quo lis introducitur, praeter ea quae in can. 1504 recensentur, debet:**
1° facta quibus actoris petitiones innitantur, breviter, integre et perspicue exponere;
2° probationes quibus actor facta demonstrare intendit, quasque simul afferre nequit, ita indicare ut statim colligi a iudice possint.

§ 2. Libello adnecti debent, saltem in exemplari authentico, documenta quibus petitio innititur.

§ 1. In addition to the matters enumerated in can. 1504, the petition which introduces the suit must:
1° set forth briefly, fully and clearly the facts on which the plaintiff's pleas are based;
2° indicate the proofs by which the plaintiff intends to demonstrate the facts and which cannot be brought forward with the petition; this is to be done in such a way that the proofs can immediately be gathered by the judge.

§ 2. Documents on which a plea is based must be attached to the petition, at least in authentic copy.

SOURCES: *SN* can. 456

CROSS REFERENCES: cc. 1503, 1504, 1545

COMMENTARY

Luis Madero

The procedure begins with the presentation of the petition before the competent tribunal in accordance with the criteria of cc. 1504ff. The petition must contain, in addition to the general requirements which c. 1504 sets forth, those matters enumerated in § 1 of this canon and which are more exacting, since c. 1504,2° only states that the petition must indicate: "on what right the plaintiff bases the case, and, at least in general terms, the facts and the proofs to be evinced in support of what he is affirming." In this canon, the request is made that the facts be stated "in a brief form, complete and clear, upon which the claims of the petitioner are based," and moreover, "that the petition indicate the proofs by means of which the petitioner is attempting to demonstrate the facts … in such a way that the judge can comprehend them immediately."

This major requirement is justified by the necessity to make quite clear what the object of the suit is and to know what the proofs are which must be solicited by the judge, especially the testimony of the witnesses and the findings of the expert, in a way which avoids any loss of time which would delay the process. For the same reason, there is a need for those proofs that can be provided together with the written form of the petition to be presented as appendices. Normally, one will be dealing with documents that are in the control of the petitioner. In this regard, § 2 of this canon directs that "documents on which a plea is based must be added to the petition, at least in authentic copy." This norm cannot be understood as something absolutely obligatory, because it can easily happen that such documents are not at one's disposal, in which case it would be sufficient to indicate who the witnesses are that the petitioner thinks will sufficiently demonstrate his assertions. This rule is not to be interpreted as an absolute requirement, because what is being dealt with is not a documentary process.

When the petitioner does not have the document in his possession but it exists perhaps in the hands of the respondent, he must ask in the petition that the judge order (in accordance with c. 1545), that this document be presented in the trial. In the same way, if it is required that the judge request any official copy of some document, etc., it must be asked for in the libellus of the petition.

Even though the rather rigid formality which this canon imposes for the preparation of the petition could make one think that it is possible to present the petition only in writing, nothing militates against a justifying cause for the petitioner to make his or her petition orally with the notary drawing up the acts in accordance with c. 1503, including all the items listed in this canon. That which cannot be missing logically is the precise indication of the proofs that the petitioner presents, and, if he has any documentary proof, he will have to attach it to the petition.

That insistence of no. 1° concerning the description of the facts draws one's attention to is the requirements of c. 1504, 2°. It seems, however, that what is attempted in this oral process is to accentuate the importance of the alleged facts, more than that of the law. The importance of the story supporting the action being taken in the suit being brought to bear is greater than the necessity to argue that the alleged right which must be recognized by the judge; substantiation counts for more than individualization. The appropriateness or the non-appropriateness of the sentence (c. 1620, 8°) will depend more on the facts than on the claimed law, as is emphasized by c. 1677 § 3. In the oral process the faculties of the judge to formulate the doubts and to respond to them in his sentence are broadened (cc. 1661 § 1 and 1668 §§ 1–2). There will be less risk of incongruity, this depending on whether the judge is aware of the proven facts, apart from the juridic solution that he may offer.

Finally, in § 2, there is manifested the desire to avoid, in the very act of the hearing itself, having the matter of authenticity to come to the fore regarding the copies of the documents which are serving as the fundamental proof for the petition. Within this petition itself, if it has documentary proof attached to it, it must be guaranteed that the copies being offered are authentic (c. 1544). They must be instrumental in such a way that they efficiently vouch for their exact conformity with the original documents.

1659 **§ 1. Si conamen conciliationis ad normam can. 1446, § 2 inutile cesserit, iudex, si aestimet libellum aliquo fundamento niti, intra tres dies, decreto ad calcem ipsius libelli apposito, praecipiat ut exemplar petitionis notificetur parti conventae, facta huic facultate mittendi, intra quindecim dies, ad cancellariam tribunalis scriptam responsionem.**

§ 2. Haec notificatio effectus habet citationis iudicialis, de quibus in can. 1512.

§ 1. If an attempt at mediation in accordance with can. 1446 § 2 has proven fruitless, the judge, if he deems that the petition has some foundation, is within three days to add a decree at the foot of the petition. In this decree he is to order that a copy of the plea be notified to the respondent, with the right to send a written reply to the tribunal office within fifteen days.

§ 2. This notification has the effects of a judicial summons that are as mentioned in can. 1512.

SOURCES: *SN* can. 457

CROSS REFERENCES: cc. 1446 § 2, 1505, 1509–1512, 1665

COMMENTARY

Luis Madero

Once the petition has been introduced in the tribunal, the judicial Vicar or the president, if one is dealing with an interdiocesan tribunal, will have to assign the case to one of the judges of the same tribunal or decide whether it is convenient for him to hear it personally.

The judge who is going to hear the case must remain unchanged during the whole trial, and because of this it is recommended that this be planned from the beginning. This judge will receive the written petition and will properly study it. If there is any hope that the parties might arrive at a reconciliation, he must try to convince them that it would be better to arrive at a mutual agreement. This norm does not fail to present the general rule, expressed in c. 1446 § 1, to avoid litigations in so far as possible and to settle them beforehand and peaceably. This conciliatory attempt is not indispensable, because the judge can discern, once he has studied the petition, that there is not much probability of their coming to an accord (it

can be seen how in the planning stage an attempt was exacted, as being necessary, at conciliation, but afterwards this need was eliminated).[2]

The judge must study the libellus to prove whether the procedural assumptions exist or not (cf. c. 1505). He will also evaluate it to see whether the petition, at least initially, appears well-founded, meaning, if it possesses what the canonical doctrine understands by *fumus boni.* If it absolutely lacks that *fumus*, it must be rejected *in limine litis*, despite the fact that c. 1658 § 1 has emphasized the importance of the alleged facts and their proof (cf. c. 1505 § 2, 4°). The result is that it is easier to know whether this type of petition does or does not have a basis because the libellus must indicate with greater precision its basis. When a petition is presented about a matter that is found to be excluded from this type of process the judge will have to inform the petitioner about this fact so that the petitioner can pursue the matter by way of the ordinary contentious process.

If the judge, after having analyzed the libellus, observes that everything is in order and that there is a definite basis for the petition, he must by means of a decree *ad calcem* admit the petition to trial and he or she will order the respondent to be cited.

The judicial citation reflects the unique characteristic of what is described in the canon, because, actually, the respondent is not summoned to appear before the judge and to respond, but he or she is merely sent a copy of the text of the petition with the decree of its acceptance. He is also notified that he has a time period of fifteen days to respond to the petition in writing. This time-period is a legal time period that cannot be prorogued. As a matter of principle, it seems suitable to be prepared for the response. However, we think that, together with the copy of the petition, there must be an indication that copies of the documents presented by the petitioner with his or her petition were also delivered to the respondent. A complete transmission of this notification requires the revelation of the entire petition to the respondent, that is to say, the libellus accompanied by the copies of the documents that have been presented in authentic forms with the formulation itself of the claim of the petitioner (cf. c. 1658).

The notification of the libellus must be done by one of the means provided in cc. 1509–1511. That notification has the effectiveness of the citation, or in another sense, it brings with it the properly so-called initiation of the process, constituting the juridical procedural relationship (cf. c. 1512), which c. 1517 terms *instantia.*

The respondent, once the written petition of the petitioner has been seen, can send his or her answer to the petition to the office of the tribunal in the time period of fifteen days. This will be the respondent's most common approach, although, obviously, one can, if one so desires, make no

2. Cf. *Comm.* 11 (1979), p. 250.

response to the petition at all, in which case he or she would be declared absent according to c. 1592. Record of this absence will always be recorded in the proceedings (cf. c. 1509 § 2), because of the return receipt from the postal service by which notification was made, including the date of the petition. This date provides a definite authenticity, because, otherwise, the computation of the time period to respond, which c. 1659 § 1 provides, will lack the guaranteed date which is legally required, and gives rise to problems which affect the fundamental rights of the parties.

We think that if the respondent desires to make use of the right to choose which c. 1656 grants him, it is at this moment that one must make known one's wish to use the ordinary contentious process to avoid unnecessary delays, although in reality there is no specific norm established in this respect in the *CIC*. In any view, to accept another solution would affect the good procedural order in the oral process, and would also require a definite preclusive effect, above all when one tries to avoid procedural fraud and the manipulation of the process of one of the parties against the other (and against justice in general). The late presentation of the petition for which there follows the ordinary contentious process can be converted, in the hands of a litigant of bad faith, into an instrument of unjustified procedural delay, for which having to straighten it out is unacceptable.

In the response to the petition, the respondent can make use of all the exceptions which are possible in the concrete case in order to oppose the claim of the petitioner. This theme in its entirety cannot be developed here, but it is sufficient to direct one to the commentary on cc. 1491ff. Notice that, when it is a matter of exceptions which are founded on other non-existent facts, or are impediments to or are exclusions to the action, the respondent must also combine with one's response the proofs that one thinks will serve him or her. This statement is apparently deduced from the mention that is made in c. 1665 about: "proofs which were not submitted or requested in the plea or reply ..." If it is a matter of witness testimony or the report of the experts, it would have to include the list of witnesses with their respective addresses. If the advise of an expert is wanted, the respondent must do it at this time. The purpose will be to make it possible for everything to be ready to facilitate the assembling of the proofs. If it is a matter of documentary proof, it should be appended to the response to the petition. Otherwise, the principle of procedural order, required for the greater efficacy of the act of the proper hearing for this process (cf. cc. 1661–1668 § 1), will be threatened by the later need of having to hold several hearings unnecessarily.

The fact that every type of exception on the part of the respondent can be brought forward shows us clearly (see the introduction to the section) that we are dealing with a type of process that must be qualified as a process with "plenary *cognitio*," and not "summary *cognitio*," which considerably limits the means of defense and of attack.

1660 **Si exceptiones partis conventae id exigant, iudex parti actrici praefiniat terminum ad respondendum, ita ut ex allatis utriusque partis elementis ipse controversiae obiectum perspectnm habeat.**

If the exceptions raised by the respondent so require, the judge is to assign the plaintiff a time–limit for a reply, so that from the material advanced by each he can clearly discern the object of the controversy.

SOURCES: *SN* can. 458

CROSS REFERENCES: cc. 1463 § 1, 1660, 1661 § 1

COMMENTARY

Luis Madero

The respondent can oppose the petition with every kind of exception, procedural, material or mixed, whatever supports his or her right. At the same time it is logical that one can also avail oneself of a counterclaim if he or she thinks that any basis exists for it (see commentary on c. 1494). In this way, the respondent takes advantage of the opportunity that the process gives him or her to take an action contrary to that of the petitioner. Since there is no express prohibition against using the counterclaim in this type of trial, there is no doubt but that the counterclaim action can be used. Another point is that the speed that this oral process provides may be desirable or not. However, in dealing with an accelerated plenary process (see introduction to the section) the counterclaim cannot be excluded if the general conditions for it are complied with.

In all of these cases in which the response to the petition is not limited to a simple denial of what the petitioner requests, nor is it a true counterattack, the judge must establish a prudent time period for the petitioner to give suitable study to the allegations of the respondent, so that he can oppose them and try to present a counter argument. This writing of the answer to the exceptions also has a facultative character. It can be an occasion to solicit new proofs which had not been requested in the petition.

Regarding the time at which the counterclaim is to be proposed, it must be said that the *CIC* has set a time limit of thirty days after the *litis contestatio*: cf. c. 1463 § 1). This was done in spite of the large scope with which c. 1630 of *CIC*/1917 authorized the presentation of the counterclaim at any time of the judgment before the sentence. In the case of the oral contentious process, it would be permitted to compute the time period of 30 days from the moment in which there is a definite formulation of the

doubt (c. 1661 § 1). This action would permit the counterclaim to be filed within the same hearing that has to be convoked, by reason of the last cited canon, within the maximum time period of 30 days. In this sense it seems that there would be an allowance for the possibility of various and unnecessary delays that would seriously prejudice the speed otherwise anticipated in the oral contentious procedure.

It would have been preferable to establish a much shorter specific time period, for the oral contentious process, during which it would be possible to raise the counterclaim before the hearing. It should be done in such a way that the petitioner can also be given the opportunity to counter the argument of the counterclaim action within a short time period. Thus, it would be possible to leave the disputed issues to be treated in the same hearing so as to render another hearing unnecessary. In the cases of a late presentation of the counterclaim it is apparently recommended that the judge make use of the power which c. 1463 § 2 gives him, namely, mandating that the counterclaim be treated separately from the principal action. It is interesting to remember that the authors who commented upon the decretal *Saepe* held as the common opinion that the only possibility for the presentation of the counterclaim was *in exordio litis.*[3]

Regarding the time period for the proposal of the exceptions, it is advisable not to lose sight of the fact that they must be proposed *in limine litis,* that is to say, before the doubt has been formulated (cf. c. 1459 § 2). Once the formulation of the doubt is determined, the right to propose them is precluded (especially those which refer to the persons and to the method of judgment, although eventually it will be possible to propose them after this decree when the exceptions in reality occurred afterwards).

The peremptory exceptions of the completed suit must be proposed before the *litis contestatio* in accordance with c. 1462, yet it would be admissible for them to be proposed afterwards. However, the one making the proposals must prove that he or she did not cause the delay maliciously. In the oral process this time when the doubt is determined by the judge should be properly understood, since, strictly speaking, there is no *litiscontestatio.*

The rest of the peremptory exceptions have to be proposed before the determination of the doubt by the judge. Normally, they are proposed by the respondent in writing in response to the petition. In the case where the respondent has undertaken a counterclaim action, the respondent first must allege the exceptions which c. 1660 allows in writing. Logically, these exceptions must be treated jointly with the principal matter in the hearing and must be resolved in the definitive sentence.

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3. Cf. IOANNES ANDREA, *Liber sextum Decretalium Bonifacii papae VII, Clemens papae V Constitutiones cum apparata Ioannis Andreae* (Venice-Baptista de Tortis 1496/1497), fol. 52v.; IOANNES AB IMOLA, *Lectura super Clementinas* (Venice 1480), fol. 22 3R.

1661 **§ 1. Elapsis terminis, de quibus in cann. 1659 et 1660, iudex, perspectis actis, formulam dubii determinet; dein ad audientiam, non ultra triginta dies celebrandam, omnes citet qui in ea interesse debent, addita pro partibus dubii formula.**

§ 2. In citatione partes certiores fiant se posse, tres saltem ante audientiam dies, aliquod breve scriptum tribunali exhibere ad sua asserta comprobanda.

§ 1. When the time-limits mentioned in cann. 1659 and 1660 have expired, the judge, after examining the acts, is to determine the point at issue. He is then to summon all who must be present to a hearing, which is to be held within thirty days; for the parties, he is to add the formulation of the point at issue.

§ 2. In the summons the parties are to be informed that, to support their assertions, they can submit a short written statement to the tribunal at least three days before the hearing.

SOURCES: § 1: *SN* can. 459
§ 2: *SN* can. 460

CROSS REFERENCES: cc. 1513 § 3, 1514, 1620, 8°, 1650, 1659, 1660

COMMENTARY

Luis Madero

One of the principal characteristics of the summary process in the decretal *Saepe* has been considered in this canon: the suppression of the necessity for a solemn *litiscontestatio*. It is the judge who will complete the formulation of the doubt, once he or she has seen the written petition with its response and the allegations eventually presented by the petitioner to which the previous canon refers. This is a feature of vital importance for the process, because in this way it correctly limits the object of the controversy that must remain unchanged during the entire case (cf. c. 1514). The sentence must give a full response to each one of the questions set forth in the formulation, under pain of nullity (cf. c. 1620, 8°).

According to what is deduced from this canon, the decree establishing the formulation of the doubt must be sent to the parties, together with the citation for the hearing. Although nothing is stated expressly, we think that there is room for the possibility for either of the parties, who may not agree with the *dubium*, to initiate the special recourse which c. 1513 § 3

establishes for the purpose of obtaining a modification. This is done before the same judge, who will then have to resolve the question presented in the briefest way possible. The time period for giving notice of this recourse against the formulation of the doubt is ten days from receiving the decree of the notification. The decree that resolves this matter cannot be appealed. However, it can be appealed if it is attached to the principal question.

This canon orders the judge to cite the parties and all the other persons who must participate in the hearing. He must also cite, among others, the witnesses proposed by the parties and the experts if this type of proof has been proposed.

The time period that the canon establishes is thirty days starting from the drawing up of the decree of the formulation of the doubt. In the preparatory schema another time period had been included, since the *Schema* of 1976 stipulated that the hearing should be held in a time period of not less than ten days and not more than thirty. However, later on, it was decided to eliminate the first part.[4]

Paragraph 2 of the canon permits the parties to present in writing an elaboration of their proper defences three days before the hearing is to be held. The nature of these briefs is not very clear, but in some cases they can be useful for presenting possible additional arguments or even for requesting some additional proof which has not been asked for either in the petition or in the response to the petition. Of course, what seems to remain completely excluded from these briefs is raising some new question, either on the part of the petitioner or on the part of the respondent.

The canon does not insist that these briefs be sent to the opposing party, but in principle, they will come to know the contents of these amplified briefs only during the hearing.

4. Cf. *Comm.* 11 (1979), p. 252.

1662 In audientia primum tractantur quaestiones de quibus in cann. 1459–1464.

In the hearing, the questions mentioned in cann. 1459–1464 are considered first.

SOURCES: —

CROSS REFERENCES: cc. 1459–1464, 1649 § 1, 1660

COMMENTARY

Luis Madero

On the day designated for the hearing there must appear before the judge, the parties, their advocates, if they have them, and the witnesses and experts, if their participation is required in the case.

The hearing is the most important part of the procedure, since this is where the entire instruction proper to the case takes place before the judge. First of all, those peremptory exceptions must be necessarily resolved, with the exception of those which, through the treatment of the basic questions, require proof and must be resolved in the judgment.

Effectively, this canon establishes that in the hearing the matters to which cc. 1459–1464 refer have to be treated first. This requirement might make one think that all the possible exceptions have to be treated in the hearing. We think that it is not necessary because some exceptions, especially those that make reference to the presupposed procedures and to the manner of the constitution of the trial, must be raised and resolved beforehand. It would go against procedural economy to delay the resolution until the hearing (cf. cc. 1459 § 2, 1460) because it would permit the process to proceed that was wrongly constituted *ab initio*. Once the hearing has taken place, if the judge admits an exception, all that has been done can become useless. This can be said especially about the exceptions to the completed case (c. 1462 § 1), which, however, are easily capable of being weighed and evaluated, even if their nature is not dilatory, even if they are being objected to as being dilatory.

In the hearing those other exceptions have to be treated which, as c. 1459 § 1 points out, make reference to the nullity of the sentence: "Defects which can render the judgment invalid can be proposed at any stage or grade of trial; likewise, the judge can declare such exceptions ex officio." In fact, this is something new in the *CIC*. It permits proposing the nullity of the procedural acts at the time at which they are produced, that

avoids proceeding to a null judgment, although in reality, it is more of an exception properly speaking. What is meant here is that an act of procedural nullity occurs *in situ*, that was equivalent to an *actio ex attentati* in the *CIC*/1917 (cc. 1854–1857). With this action, one does not avoid seeing a certain resemblance in its function,[1] since every null act can be declared as such at the insistence of the party or ex officio by the judge.

The indubitable advantage that the influence of the principle of radical concentration offers is that such a declaration, even in the case where it is done ex officio by the judge, has to be brought to a conclusion before the parties and their advocates. This gives them the possibility of alleging their respective reasons in a contradictory proposition, as to why the incidental matter should be overturned.

Logically, what has to be resolved in the hearing is how the counterclaim action is to be treated, if one has been presented (cf. c. 1463 § 2; see commentary on c. 1660). If the judge chooses to treat the principal action and the counterclaim together, the proofs of both will have to be brought out in the same hearing. What must be decided initially at the beginning of the hearing is whether the counterclaim ought to be joined together with the principal or initial argument.

Likewise the possible incidental matters about the guarantee of payment for the judicial expenses (cf. c. 1649 § 1, 5°), the concession of gratuitous service and the reduction of costs (cf. c. 1649 § 1, 3°), must be resolved. If it is in the ordinary contentious process they must be resolved according to the norm of c. 1464. In the oral contentious process they should be resolved in writing before the hearing.

All the matters set out in the acts of the hearing about which the judge has to arrive at specific resolutions, are, we think, not capable of recourse. This includes those matters that arose on the occasion of proposing and studying the proofs. In the oral process the doctrine that García Faílde affirms about the exceptions has to be applied to its full extent. The argument is that "the entire process must proceed with the greatest rapidity."[2] That is why there can be no appeal of these resolutions conforming to c. 1629, 4°. Also, according to this author, "these appeals would totally frustrate the nature of this procedure which demands that everything be resolved rapidly in one hearing or in a few sessions which continue without long interruptions."[3]

1. Cf. A. QUINTELA, *El atentado en el proceso canónico* (Pamplona 1972), pp. 127ff, 148ff.
2. J.J. GARCÍA FAÍLDE, *Nuevo Derecho Procesal Canónico* (Salamanca 1984), p. 282.
3. Ibid.

1663 **§ 1. Probationes colliguntur in audientia, salvo praescripto can. 1418.**

§ 2. Pars eiusque advocatus assistere possunt excussioni ceterarum partium, testium et peritorum.

§ 1. The proofs are assembled during the hearing, without prejudice to the provision of can. 1418.

§ 2. A party and his or her advocate can assist at the examination of the other parties, of the witnesses and of the experts.

SOURCES: § 1: *SN* can. 461
§ 2: *SN* can. 454

CROSS REFERENCES: cc. 1418, 1529, 1560

COMMENTARY

Luis Madero

The study of the proofs proposed by the parties must be done during the hearing. It is precisely here where the principle of immediacy comes into full play as well as that of concentration. The judge who is going to decide the case becomes knowledgeable about the parties and the witnesses. He listens to them attentively, pondering the strength and veracity of their declarations,and so forth.

Paragraph 1 of the canon takes into consideration a certain exception to the principle of immediacy, because it has logically foreseen that in certain cases some mediation may be necessary, because c. 1418 refers to the necessity of having recourse to judicial assistance when, in order to gather a certain proof which cannot be found in the territory in the jurisdiction of the judge who is hearing the case, he or she appeals to another tribunal for assistance. In this case, it should be requested sufficiently beforehand in order to be able to have it present at the time of the actual hearing. Whoever has experience in tribunals will know well that it is not always easy to accomplish this in such a short time (30 days counting from the formulation of the doubt) when one asks for judicial help, when dealing with countries with vast stretches of territory where few tribunals exist.

Although this canon does not mention it, it can may be necessary to anticipate collecting some proofs according to c. 1529. In this case, it is not always easy, seeing that it is the same judge who would collect the proof beforehand, and who would be available on the day of the hearing.

When any expertise is sought, the judge must arrange for it beforehand so that the expert can present his findings at the hearing. Without a doubt the presence of the expert greatly facilitates the clarification of the matter (and, besides, the judge and the advocates of the parties are able to request more clarifications).

Paragraph 2 of the canon established the possibility by which the parties and their advocates assist in the interrogation of the other party, of the witnesses, and of the experts. This is a reflection of the principle of publicity that is inherent in the oral trial. One should be aware in every way that the witnesses and experts must remain outside the hearing room while waiting to be called, because it is suitable to interrogate them separately. In this way, they have no knowledge about the deposition of the other witnesses (see commentary on c. 1560). When it is necessary to have a meeting among the witnesses, it can be done in conformity with c. 1560 § 2. It is important to note how, in the oral process, given the principle of concentration, the proofs are collected and published within the same hearing. It is fundamental that this happens while the parties and their advocates are present, since, otherwise, they will not have knowledge of what has happened.

Note that there is no reference to the procurators of the parties, something that is very indicative of the rare importance of the matters that must be negotiated and judged, following the procedure of the oral contentious process. Due to its minor relevance, it does not appear so necessary that the parties act through procurators, especially when their appointment is optional (c. 1482).

With respect to the attendance of the parties, they have the obligation to be present in the courtroom because they are going to be interrogated by the judge in the session of the hearing. What the canon is precise about is that they can assist in the interrogation of the witnesses and experts, a prerogative that third parties do not have.

In the acceptance and in the presentation of the proofs in the hearing session, the judge must prudently moderate the conduct of the parties and of third parties (experts, witnesses, etc.) so as not to allow a betrayal of the spirit of c. 1670, lest the expediency and flexibility of the process be contrary to the guarantees which the *CIC* has established in the matter of proofs.

1664 **Responsiones partium, testium, peritorum, petitiones et exceptiones advocatorum, redigendae sunt scripto a notario, sed summatim et in iis tantummodo quae pertinent ad substantiam rei controversae, et a deponentibus subsignandae.**

The replies of the parties, witnesses and experts, and the pleas and exceptions of the advocates, are to be written down by the notary in summary fashion, restricting the record to those things which bear on the substance of the controversy. This record is to be signed by the persons testifying.

SOURCES: —

CROSS REFERENCES: cc. 1437 § 1, 1472

COMMENTARY

Luis Madero

With great skill, the canonical legislator elicits our understanding by harmonizing the principle of writing with that of speaking, this last being inherent in the essence of the oral contentious process. He does this in establishing the need for written evidence (in a summary fashion and in whatever pertains to the substance of the case), of the responses of the parties, witnesses and experts, as well as the claims and exceptions of the advocates. If we keep in mind that in order to conduct a plenary process that is accelerated, there exists no limitation in allowing possible challenges to the sentence in this type of process. Moreover, what has been established here is of the greatest usefulness because, especially for the appeal, it absolutely militates against economy to repeat, in the second instance, everything that took place in this hearing. It will suffice simply to send to the respective tribunal a written summary of the acts, together with the sentence of the first instance, so that the judge of the higher instance can decide if the appeal should proceed, or not, and if the sentence ought to be corrected.

If, however, the prescriptions of the canon are not put into effect in some countries, the great distance existing between ecclesiastical tribunals might greatly impede, parties of lesser means from attending the new hearing which supposedly would be necessary in the second instance. Normally, since the notary has executed a summary, another hearing in second instance is not necessary, as required by the norm,because the judge or the appellate tribunal will have a written summary of what has been done in first instance and which is related to the substance of the litigation.

For those written summaries to have value, they must be signed by those who are testifying, as well as by the notary who must certify the acts. Keep in mind that it is inherent to the oral aspect that the procedural acts are valid even when they have not been put in writing (see introduction to the section), because, obviously the oral process would be distorted if cc. 1437 § 1 and 1472 were to be strictly applied. In this regard, a certain flexibility must exist precisely in order to avoid that possible distortion.

Although the canon does not mention the judge among those signing the acts consigned to the notary, nevertheless the hearing process is evidence of the actual presence of the judge before the parties and their advocates. Not only does he receive the proof but he also will make interlocutory decisions of an oral character. Moreover, if c. 1569 § 2 prescribes this for the proof of witnesses, as well as for the declarations of the parties and to the proof of the judicial confession (c. 1534), the signature of the acts by the judge is especially made necessary since he was the one who held the hearing. This opinion can also be upheld on the basis of c. 1670. In the same way, *servatis servandis*, if convenient, it would be wise for the notary to tape record the deposition (c. 1569 § 1) and draw up the acts.

1665 Probationes, quae non sint in petitione vel responsione allatae aut petitae, potest iudex admittere tantum ad normam can. 1452; postquam autem vel unus testis auditus est, iudex potest tantummodo ad normam can. 1600 novas probationes decernere.

Proofs which were not submitted or requested in the plea or reply can be admitted by the judge only in accordance with Can. 1452. After the hearing of even one witness, however, the judge can decide upon new proofs only in accordance with Can. 1600.

SOURCES: *SN* can. 464

CROSS REFERENCES: cc. 1452 § 2, 1600, 1645 § 2, 1°–3°, 1662

COMMENTARY

Luis Madero

This canon regulates some of the directive powers of the judge in the hearing, especially in whatever refers to the possibility of admitting new proofs. A definite preventive norm compatible with the concentrated nature of the hearing has been established. This clarifies the rights of the parties, but also their incumbent duties that are suitable to assure that the process will go on without dangerous confusion in roles and risks of delays.

Two moments or phases are distinguished within the hearing: the first is devoted to the preliminary matters (c. 1662); the second starts when the judge begins to hear the declarations of the witnesses ("postquam autem vel unus testis auditus est").

1. During the first phase, which is designated to deal with those incidental matters requiring specific resolutions, especially those originating from dilatory exceptions (c. 1458), competency issues (cc. 1460–1461) and mixed exceptions (c. 1464 § 1), the judge can ex officio admit the proofs he sees to be necessary for a clarification of the case, in conformity with c. 1452, especially in § 2.If he thinks that the sentence is going to be gravely unjust, he can make up for the negligence of the parties in their presentation of the proofs or opposition to the exceptions. Obviously, and *a fortiori*, he will also be able to admit some proof that was requested at that point by either of the parties, even though the rule does not compel the acceptance of these proofs, since in c. 1665 it is clearly stated what in c. 1658 § 1, 1° is only presented as an anticipation of the hearing. To

compare both canons, this process tips the scales of the *onus probandi* (c. 1526 § 1) upon the petition and the rejoinder, if there is one, or, in the extreme case, of the response of the petitioner. Canon 1660, however, says nothing in this respect, and neither does c. 1659 § 1 say anything about the response of the respondent, this is a consequence of the principle of procedural equality and of the interpretation of c. 1665 in relation to c. 1658. These phases of the written allegations are the only ones in which the parties have the opportunity of proposing the proofs which they believe favor their own position.

2. The second phase begins at the precise moment that the first witness is heard. This moment is the equivalent, in the oral contentious process, to the conclusion *in causa* of the more solemn or ordinary contentious process (see commentary on c. 1599). In this phase of the hearing, the canonical legislator by way of exception allows, however, that certain proofs which have not been requested at the appropriate time be requested and admitted, but only when they fulfill the conditions of c. 1600:

— in private matters, if all the parties are in agreement;

— in public matters, if there is a serious reason for it, if the parties have been heard and the danger of fraud is avoided;

— in all cases, if the judge believes that, should he not admit these proofs, the sentence will be unjust according to c. 1645 § 2, 1°–3°.

3. No limitation exists for the submission of any document pertaining to the case that was not presented beforehand without the fault of the interested party. This is a hypothesis that is a bit peculiar, since the normal procedure is that such a document is presented together with the petition, and if not, at the beginning of the hearing. At any rate this possibility remains open. In the case of the oral contentious process it refers more to the request made during the hearing for the producing of some document that the party does not have at his or her disposal.

1666 Si in audientia probationes omnes colligi non potuerint, altera statuatur audientia.

If all the proofs cannot be collected during the hearing, a further hearing is to be set.

SOURCES: *SN* can. 464

CROSS REFERENCES: cc. 1664, 1668 §1

COMMENTARY

Luis Madero

This canon permits an eventual second hearing when the quantity of the proofs is very great and there is not enough time in a single hearing to do everything or to do it well in the case where proofs can be asked for but cannot be produced immediately. The judge is able to convene a new hearing. He can choose to call a new hearing even at the time of the first session or he can send a new citation to the parties and any new person (or persons) whose presence is required as witnessor expert. The canon says nothing regarding the time period for this new hearing. It will be reasonable to make it as soon as possible lest one lose sight of everything that has taken place in the first hearing, proof of which will only lie in the brief summary to which c. 1664 makes reference. The judge must make his decision, basing his opinion on everything that has transpired. In the event that a great deal of time has passed, it is possible that the judge might forget important details. Hence it is advisable to designate the soonest possible date.

The violation of the principle of concentration must be avoided, as well as the principle of the immediacy of the judge and parties that the hearing requires, and which is what justifies the norm of c. 1668 § 1. This canon prescribes that the judge must decide the case immediately, and, what is more, that he must read the dispositive part of the sentence. The possibility of thinking that c. 1666 permits delays for the second hearing, or that there is an open rule allowing for other eventualities and subsequent convocations, based on a lack of time, on difficulties of proof, or on the non-appearance of some of the parties or their advocates, would betray the spirit with which the oral process has been conceived and regulated. Only those proofs that are required with the help of judicial assistance (cc. 1663 § 1 and 1418) can justify the delay. However, the competent judge must request in his or her rogatory letter, the speedy reply of the person being asked to submit some proof and the need for its being forwarded as soon as possible.

1667 **Probationibus collectis, fit in eadem audientia discussio oralis.**

When the proofs have been collected, an oral discussion is to take place at the same hearing.

SOURCES: *SN* can. 462

CROSS REFERENCES: cc. 1598, 1599

COMMENTARY

Luis Madero

The principal of procedural concentration demands that all the activities, that is, both the presentation of the proofs and the discussion of the case plus the judgment, be dealt with in the hearing. This canon gives full support to this principle. Since all the procedural interventions, the declarations of the parties, the interrogatory of the witnesses, etc., have been done in the presence of the parties, the publication of the proofs and the conclusion in the case become unnecessary (cc. 1598–1599). Hence, immediately afterwards the discussion between the parties or their advocates should follow in the presence of the judge. The judge will have to direct the discussion in a suitable fashion, allowing for an oral exchange on the part of the petitioner and on the part of the respondent, following the order of topics that must be discussed.

Most important in this type of process is the ability and quickness of thought, both of the advocates for the parties and of the judge himself, from whom there is demanded a special attentiveness to the dictatation of a just sentence. The advocates of the parties will have to prepare their defenses and allegations, giving consideration to the nature of the proofs presented and the result to be obtained.

A problem presents itself as to whether the discussion is going to be about all the proofs taken together or only the proofs presented in the hearing. Following the first possibility, if the help which was solicited has not been sent in time (c. 1418), the hearing will have to be put off until the judge receives the proofs that have been presented at another tribunal. It can also happen that the solicited proof falls under c. 1600 (cf. c. 1664 § 2) that requires another hearing. These are items that deserve emphasis, especially where the brevity of the oral process appears to be threatened.

If the other possibility follows, the discussion during the hearing centers on the proof being presented. The judge, however, is not obligated to the strict time limits of c. 1668 §§ 1 and 2, since the time period to issue

the sentence would be paralyzed until such a time as the proof would be produced, or, yet, if it is the type of proof as found in c. 1418, until such a time as it has been accepted by the competent judge and incorporated into the proceedings.

It would have been desirable if the canons had been more precise in this respect. It is recommended, however, to adopt an interpretive position. Although a policy of not convoking the discussion until all the proof has been presented can find support by analogy in c. 1600 § 3, it is recognized that the chance for delays that this canon provides for the ordinary process is entirely incompatible with the concentration and the rapidity of the oral process. For this reason, we state that we are inclined toward the second possibility. We do this without prejudice toward what may be discussed during the appeal concerning the evaluation of that proof by the judge alone that was presented in the first instance.

1668 § 1. **Nisi ex discussione aliquid supplendum in causae instructione comperiatur, vel aliud exsistat quod impediat sententiam rite proferri, iudex illico, expleta audientia, causam seorsum decidat; dispositiva sententiae pars statim coram partibus praesentibus legatur.**

§ 2. **Potest autem tribunal propter rei difficultatem vel aliam iustam causam usque ad quintum utilem diem decisionem differre.**

§ 3. **Integer sententiae textus, motivis expressis, quam primum, ordinarie non ultra quindecim dies, partibus notificetur.**

§ 1. Unless it emerges from the discussion that something needs to be added to the instruction of the case, or that there is something which prevents the judgement from being correctly delivered, the judge is forthwith, on completion of the hearing, to decide the case privately. The dispositive part of the judgement is to be read immediately in the presence of the parties.

§ 2. Because of the difficulty of the matter, or for some other just reason, the decision of the tribunal can be deferred for up to five canonical days.

§ 3. The full text of the judgement, including the reasons for it, is to be notified to the parties as soon as possible, normally within fifteen days.

SOURCES: § 1: *SN* can. 467
§ 2: *SN* can. 467
§ 3: *SN* can. 466

CROSS REFERENCES: *cc. 1610, 1614, 1615, 1657*

COMMENTARY

Luis Madero

Once the discussion is concluded, and if the judge does not see that any additional instruction of the case is necessary (that generally could determine the necessity of a new hearing), he alone has to decide immediately ("expleta audientia, causam seorsum decidat").

The ability to demand additional instructions can be understood in accordance with c. 1452, and must be subjected to the limitations of c. 1600 (cf. c. 1665). The same holds for the idea of an obstacle that the appropriate canon indicates must be subjected to a very strict criterion.

Canon 1668 seems to indicate that the judge is to make his or her decision (cf. c. 1657) as well as in drafting of the dispositive part of the sentence (cf. also c. 1610 § 1). Normally, the dispositive part of the sentence will be very short because it contains only the decision of the case without a need to explain the basis for the decision.

The text of the canon sufficiently clarifies the fact that the act of judging refers only to the judge, and it makes no difference whether he or she has the help of assessors (cf. 1654 and 1424), or whether he or she has asked their advice, the judge is to make the decision alone. Nothing is said in the present canon, nor is it deduced from c. 1424, about the judge dictating his sentence together with his assessors. Their function is "to give their advice to the judge, but not to take over the proper functions of the judge."[1]

The dispositve part of the sentence must be read by the judge in the presence of the parties. These, if they wish, can make their wish known to appeal the sentence. At any rate, it is advisable to keep in mind that the judgment does not have any juridic efficacy before it is fully published (cf. c. 1614). As happens in the oral contentious process, the dispositive contents of the decision is communicated to the parties beforehand (as §§ 1 and 2 of the present canon anticipate). For the publication of the sentence the notification of the parties is to be understood as taking place with this same correspondence in accordance with c. 1615. From that moment, full juridic effect takes place and the time periods begin to run for possible challenges to the sentence.

When a just cause exists, and when the subject matter is the same, the judge, for the purpose of studying the resolution with greater thoroughness, can use the faculty which § 2 of this canonprovides. The time period which it allows to carry out a more profound study of the case is sufficient. Once this time period has been completed, the judge will have to pronounce the dispositive part of the sentence. If he or she considers it opportune, nothing prevents him or her from including the argument section of the sentence. Moreover, in any eventuality, the judge has another time period of fifteen days to dictate the complete sentence (§ 3).

The time period of fifteen days given to the judge is quite a bit shorter than that established by c. 1610 § 3 for the ordinary contentious trial. In a special case, the judge can increase it a little. In general, however, in order not to impede the administration of justice, it will never be advisable to defer too long the pronouncement of the definitive sentence.

1. L. DEL AMO, commentary on c. 1424, in *CIC Pamplona*.

1669 **Si tribunal appellationis perspiciat in inferiore iudicii gradu processum contentiosum oralem esse adhibitum in casibus a iure exclusis, nullitatem sententiae declaret et causam remittat tribunali quod sententiam tulit.**

If the appeal tribunal discerns that a lower tribunal has used the oral contentious process in cases which are excluded by law, it is to declare the judgement invalid and refer the case back to the tribunal which delivered the judgement.

SOURCES: —

CROSS REFERENCES: cc. 1600, 1620ff, 1638–1640, 1656 § 2

COMMENTARY

Luis Madero

To the reasons for nullity of the sentence enumerated in c. 1620, there is added the cause of nullity that this canon sets forth. When a case that is excluded by law has knowingly been processed according to the oral contentious trial, once this is discovered, it is thrown out. This nullity of the sentence by reason of exclusion from this procedure has a close relationship with the exception of nullity of those procedural actions qualified as dilatory by c. 1459 § 2 when the exceptions to the *modum iudicii* are referred to. In this event, there is no doubt but that what is being treated here is an irremediable nullity, which can be declared ex officio by the judge or by the tribunal.

Added to this is the obligation for the appellate tribunal of appeal to return the proceedings to the tribunal of the first instance, so that it may be processed in accordance with the ordinary contentious process. Certainly, all the procedural acts will have to be repeated, and, in practicality, nothing that was done before can be used because, as c. 1656 § 2 indicates, all the judicial acts are null. Although the canon only mentions the nullity of the sentence, this return of the case to the lower tribunal, something which the canon has directed, signifies that this tribunal will find itself once again facing the petition in the same case in which the judge or the tribunal found itself the first time when the petition was presented (cf. cc. 1505 and 1659). This c. 1659 uses the term "tribunal" improperly, since the oral process required only one judge for the first instance (c. 1657) as it does for the subsequent instances (cf. c. 1441).

In the cases in which the judge of the second instance does not declare ex officio the nullity of the sentence, he can without any doubt interpose the complaint of irremediable nullity of the sentence and for any of the procedural sections for this reason. If this problem does not exist, the judge of the second instance will have to proceed to admit the appeal by following the steps provided for the appeal in cc. 1628–1640. Normally, in this type of cases there is no possibility of expanding the argument of the case and the appeal judge must edit the formulation of the doubt in accordance with c. 1639 § 1: "Whether the prior sentence is to be confirmed or even if it is to be reformed in whole or in part." This is perfectly compatible with the adherence to the norms of cc. 1628ff, for the lodging of the appeal, its formalization afterwards before the judge *ad quem*, the rights of the parties, and the subsequent formulation of the doubts,and so forth.

Assuming where there are proofs that were solicited in the first instance and were rejected by the judge, they still can be admitted by the judge of the second instance. The proofs not solicited in the first instance can be admitted only in accord with c. 1639 § 2,which refers it to c. 1600. If new proofs are not necessary, one must proceed directly to the discussion of the case, which, in our judgment, must be adapted to the proper nature of the oral judgment, for which it is sufficient to have the final session of the oral discussion (cf. c. 1667, for the analogical application). For greater facility, convenience and usefulness for the advocates, it is normally customary in practice to put the exchanges between the advocates of the parties into writing, without needing to have it done orally.

Later, when the second instance sentence is published, one must pay attention to c. 1668 § 2.

1670 **In ceteris quae ad rationem procedendi attinent, serventur praescripta canonum de iudicio contentioso ordinario. Tribunal autem potest suo decreto, motivis praedito, normis processualibus, quae non sint ad validitatem statutae, derogare, ut celeritati, salva iustitia, consulat.**

In all other matters concerning procedure, the provisions of the canons on ordinary contentious trials are to be followed. In order to expedite matters, however, while safeguarding justice, the tribunal can, by a decree and for stated reasons, derogate from procedural norms which are not prescribed for validity.

SOURCES: —

CROSS REFERENCES: cc. 20, 1501–1655

COMMENTARY

Luis Madero

The present canon defers from the subsidiary method to the norms of procedure established for the ordinary contentious process. It also gives the judge the competence, in certain cases, by means of an explanatory decree, to omit the application of some of these procedural norms whenever necessity demands his or her arriving at a quick solution of the litigation, as long as it does not deal with those norms established for the validity of the procedural acts. The term *derogare*, which is used in the text of the canon, is used in a wider interpretation of the phrase "to omit the application," though not in the strict sense of c. 20.

However, the judge has to be very careful in the exercise of this faculty, which in a certain way is discretionary and is applicable to those matters that pertain *ad rationem procedendi attinent*. Care has to be finely tuned concerning all those matters that can give rise to procedural nullities. Such nullities must be avoided from the start by the judge, since he lacks the power to convalidate what is absolutely null. The provisions furnished by the present canon, by means of the discretion thatthe judge can employ, are made so that no detriment can endanger the procedural guarantees which are closely connected to the merely procedural norms.

First, the canon demands that the interlocutory decisions of omitting the application of procedural norms be done by an explanatory decree. Secondly, it requires that the case proceed without any detriment to justice. However, all of the procedure should take place without any possibility of violating the equal status of the parties. The principle of the hearing, the principle of immediacy, that of legitimate challenge, and that of impartiality on the part of the judge, must also remain inviolable.

PARS III
De quibusdam processibus specialibus

PART III
Certain Special Processes

INTRODUCTION
Carmelo de Diego-Lora

I. General Characteristics of Special Processes

The primary and main classification of procedures is what distinguishes ordinary from special procedures. The radical difference between the one and the others resides in the fact that the ordinary processes are juridic instruments of general character that are at the service of every class of claims. In these processes the rigor and arrangement of the juridical forms that are organized by the legislator predominate, independently from any juridico-material connotation and in such a way that it makes them in the abstract capable of serving as vehicles for justice in the exercise of any of the procedural actions which the juridic order recognizes. In these the form is independent from juridic matter, but at the same time all the juridic matter can be the object of the ordinary process. This procedure, therefore, is conceived, as it has been said, as a vehicle for justice, without being conditioned by the rights which the litigants transform in their action on their claim (and the action of the opposition if this arises), into the object of the trial, which is stated clearly by means of the formulation of the doubts (cf. c. 1513 in relation to cc. 1504 and 1459–1463, and with greater skill for the oral process, cf. cc. 1658, 1660–1661 § 1).

Special processes, although they also certainly consist in a documentary organization of juridical forms (a series of procedural acts), which serve as a vehicle for justice have for their purpose the service and administration of justice. This is justice according to the exigencies of specific juridical matters that the legislator thinks they require for their procedural treatment of particular subtle differences which make their procedure special in comparison to common trial. On a previous occasion, we have already shown that "the procedures of Parts III and IV are special contentious judgments by reason of the juridic matter brought to trial."[1]

1. C. DE DIEGO-LORA, commentary on *Sectio I: De iudicio contentioso ordinario*, in *CIC Pamplona*.

Consequently, the special processes in the *CIC* are not only those contained in part III, the object of the present commentary, but also included is the "penal process", as regulated in part IV. Indeed, the specialty of this process is determined because the canonical legislator has preferred, in order to judge in a specific juridical matter (what is regulated in book VI, delicts and penalties), a documentary system for the service of justice that is more adapted to the objectives which the law of sanctions serves in the Church.

With reason, then, was the title chosen for part III, *De quibusdam processibus specialibus*, because all of them are not included in this part. It will also be fitting to add that not all these matters included in this title are technically special processes. Not all of them begin with the exercise of a procedural action (cf. c. 1491) from which the right arises in the very beginning to obtain a favorable sentence. Nor does the beginning of all the special procedures adhere internally to the requirements of the fundamental norm of c. 1504 for the introduction of the act of the claim. Nor does the sentence (cf. cc. 1607–1608 and 1611–1612) constitute the method of resolving definitively the doubt that was raised in all of them. However, we shall come back later to discuss at length what is now only being indicated here. When considering "some special processes" as a category, we have to exclude those processesthat, even though understood under this title, we consider as not constituting what technically is being designated by the procedural doctrine with the general name of trial.

In some legislations, the special processes can be numerous and can provide better justice in a concrete case, depending on whether the legislator thinks that the variety of the juridical matters being prosecuted, by reason of usefulness, merit a particular procedural treatment, in line with the content of the claim. This variety is usually looked at with prejudice by juridic doctrine because of the confusion that can be produced at the time of choosing to begin the process. At times, once the case is begun, error causes useless procedural activity, and even that procedure which seems to have been exhaustive in its treatment, because of the lack of a final decision, the process that has been chosen for the juridic matter upon which the judicial body has to make a pronouncement is not suitable. This danger did not completely escape the attention of the *CIC*. The *CIC* foresaw in its c. 1459 § 2 that the exceptions which the respondent alleges about the *modum judicii*, (the process chosen), should be proposed, for the sake of economy, before the joinder of issues. Perhaps in the canonical sphere this danger is less than in other procedural systems, first of all, because the special processes are not numerous and secondly, because the actions which are exercised in them are so clearly outlined by the *CIC* that it can be quite difficult to make an erroneous choice of the special process, although in the field of possible human errors no error can be ruled out *a priori*.

For the purpose of avoiding a proliferation of special processes, the procedural doctrine recommends that, for greater speed of procedure, a simple juridic matter which does not require a longer written process, (a written process which can provoke, above all through its incidentals, abusive delays), there exist two types of ordinary processes. The first has many options for defenses and proofs and is a written procedure. The second is an oral process that is faster, and without attention to any juridical matter and consequently is fit for any type of claim in matters of minor importance.

The latter type is what the current *CIC* has created in order to innovate the former procedural canonical system with the introduction of what it calls the "oral contentious process," the regulation of which is inserted in section II of book VII, in contrast with what is regulated in section I, and designated as an "ordinary contentious trial". Both are contentious, however, this adjective is not required, because in the modern procedural doctrine it is sufficient that one use the term "process" for what is meant as "contentious." In the canonical oral process it is as suitable to include within its operation every class of petitions, as it is so-called "ordinary." In actuality, its use by the *CIC* turns out to be very minimal, because the references that this particular book VII makes in favor of such a use are very much reduced. However, when proceeding to these references themselves the result is that a series of juridic matters can be included that are so varied that they resemble a true ordinary process, that, although rapid, is excluded from any concrete juridic matter which in any way, with its peculiarities, might influence or condition in a distinct manner the procedural model conceived by the legislator. We consider such references only in order to resolve incidental matters in a principle procedure, if the judicial body, in admitting the incidental claim, decides to resolve it through an interlocutory sentence (cf. c. 1590 § 1), either for those processes which begin through the complaint of nullity (cf. c. 1627), or those processes which resolve the juridical-material question of the separation of spouses (cf. c. 1693 § 1). However, c. 1690, excludes using this oral contentious process in determining the nullity of marriage. Consequently, if an appellate tribunal in a marriage nullity case were to observe that in the first instance court had used a process conformed in accord with the norms of the oral contentious process, this tribunal will declare the sentence null and return the sentence to the tribunal of first instance so that they might follow the written contentious trial procedure for nullity (cf. c. 1669). This is the reason why it is used so rarely, despite the advantages which speed and economy the oral process offer.

It is not, then, the contentious character which qualifies it as an *ordinario* process. It would have been more exact to distinguish between a *written process* and an *oral process*, despite the fact that the adjective *contentious* is used expressly by the *CIC* both for the so-called ordinary and for the oral trial, both being of ordinary status. Nowadays, as we have said, one understands that the entire process is contentious in nature.

Strictly speaking the special trials will also merit the use of this qualifying word "contentious" if they are really considered as a setting up for a confrontation of the parties, which is what generates the procedural contention. It is in this way that these special processes of part III are considered, when we examine those contained in title I, chapter I, and which are designated as "cases that declare the nullity of marriage". The same applies to those of chapter II, "cases for the separation of spouses," and those of title II of this same part III, "cases that declare the nullity of holy orders."

These trials we have just mentioned are authentic special trials and this designation is given neither to the so-called "process for the dispensation from a ratified but non-consummated marriage," regulated in this part III, title I, chapter II, nor to what is called the "process concerning the presumed death of a spouse," regulated in chaper IV. Even less can one understand that those activities that are regulated in the last title, number III, of this part III, "Concerning the ways to avoid judgments," are procedural, whether ordinary or special. Immediately following, we shall try to explain more in depth (yet always avoiding an anticipation of the commentaries of the respective canons), what we have just stated.

II. Various Aspects of the Special Processes

1. *Marriage nullity procedures*

a) Common and specific aspects

Those matters called by the *CIC* "causes for the declaration of nullity of marriage" include two types of processes. The term "causes" never fails to provoke a certain ambiguity of use because this word, such as it is used in the rubric of chaper I of title I of part III, could be understood as a "reason for," or the "basic motive," because every nullity has a cause. However, it is evident that it is referring to the process, and, consequently, it is used in the same sense as c. 1401, 1° assigns to the word "cause," that is, as coincidental with the word "processes" when it treats a matter, which in this case is the nullity of marriage.[2]

There are two types of special processes which this chap. I (part III, tit. I) takes in: a type of written process of nullity common to every claim of nullity, whatever may be the juridical cause upon which it is based; and the other type, rapid and oral, of a summary character, called, this time with great propriety, "a documentary process."

2. Regarding the terminology of the *CIC* on this point, see the commentary on c. 1401, and the introduction to book VII, *De processibus*.

The nullity of marriage is a procedural theme that greatly preoccupies the canonical system and in fact to a great extent exhausts the activity of the ordinary tribunals of the Church. The statistics that have been published in this respect prove this phenomenon. While it is affirmed that these procedures pertain by proper right to the ecclesiastical judge (cf. c. 1671), it is also true that the *CIC* does not give up its attention to interests of the civil order which also argue in these procedures of nullity of marriage when the judicial organ of the Church agrees upon the claimed nullity. It is understood that in principle it pertains principally to the civil judge to judge in these matters (cf. c. 1672), and yet, the *CIC* does not overlook other effects of a moral and even of a civil character, which can affect those who were living apparently as proper spouses, once nullity was obtained, as well as with respect to the children, if there were any (cf. c. 1689).

The three norms which were just cited contain the character of general norms, but only a third of these is contained within "general norms" (art. 7 ch. I pt. III, tit. I). Instead, cc. 1671 and 1672 are included in article I, which at first sight, gives the impression that it pertains exclusively to the special written process of the nullity of marriage in the organization of the chapter, while the documentary process is not distinguished beforehand, since its canons are collected in art. 6 ch. I, as if it had no proper identity distinct from the previous one. This situation makes it necessary, in the system of the *CIC* and in the beginning of the enumeration of the canons of ch. I, that there also be presented some canons which do not treat exclusively the special written process of nullity, nor do they pertain to the normative exigencies that are shared equally with the documentary procedure. Therefore, this takes place with the norms for determining competency fixed in c. 1673 (including also in art. I of ch. II); with the two canons dedicated to active legitimacy, cc. 1674 and 1675, and together with the previously mentioned legitimacy the other effects derived from the death of one of the spouses or of both (both canons are included in art. 2); and with c. 1676 (first in the order of the canons included in art. 3 ch. I), to the transfer to the process of nullity of marriage, as permitted, from the efforts of reconciliation, which are manifestly preferred in c. 1446 for all processes.

They wanted to establish, in c. 1673, some specific norms of competency for the procedures of marriage nullity, with more variations of choice for the petitioner than c. 1408 presents or which cc. 1410 and 1411 can provide. Some limitations have also been added as guarantees to avoid capriciousness (either arbitrariness or fraud) in the criterion for the choice of competence. In cc. 1674 and 1675 it has limited the active legitimation in the processes of nullity to avoid an extension of the concept of legitimation *ad causam* which could give rise to abuses in prejudice toward the peace of the spouses, who have in their favor the presumption of the validity of their marriage (cf. c. 1060). The nullity pertains, however, to the ecclesial public order when it is made public, in the circumstance that the

promoter of justice has the obligation to bring an action of nullity, while avoiding at the same time everything that can seem to be the possibility of exercising a public law action. Finally, if the spouses can convalidate their marriage and reestablish conjugal life a moral good will be produced that is superior to its opposite, by the fact that the judge is obliged in c. 1676 to undertake this pastoral duty for the good of the spouses.

These norms are common for every process of marriage nullity, as also those of c. 1684, relative to the effect of the affirmative sentence of nullity or of the decree confirmatory, in so far as such pronouncements give rise to the freedom of the spouses to contract a future marriage. In the documentary process only a first affirmative sentence is necessary, because there is no need for an appeal (cf. c. 1687). It also entails c. 1685, which stipulates that ex officio notations of the final judicial pronouncement of the marriage nullity are to be made in the marriage register and baptismal registers of the two spouses. These two canons have been included in art. 5 ch. I, whereas its place should have been found in art. 7, dedicated to "General Norms."

Instead, cc. 1690 and 1691, although included among "General Norms," given the sense of the first and the possibilities that the second offers, have their *ratio legis* but apply more suitably to the written process of nullity than to the documentary process, which is, in extent, very limited and very strict in its potential for allegations and proof.

Having pointed out what is common or general, both for the written and for the documentary processes for marriage nullity, as well as for what is not common, even though this information is found under the section of "General Norms" (art. 7). We shall next indicate the essential part of each process.

b) *Distinctive aspects of the special written process of marriage nullity*

We have used the term "written" to distinguish it from the documentary process. In the same way, we could have called it an "ordinary process of marriage nullity." However, should we use this terminology, it might be confused with the so-called "ordinary contentious trial," regulated in sec. I pt. II of book VII. The expression "ordinary contentious" did not add anything, as was indicated before, since the proper use of the word process, (like trial, when this term is used indistinctly with process), always entails a face-to-face meeting of the parties, that is a definite confrontation. The word "ordinary" would then misleadingly characterize these two processes, be it that of sec. I, or that of tit. I, ch. I pt. III or the special written process of marriage nullity. For this reason it was preferred to use this last terminology emphasizing special relationshsip to the juridic matter submitted as the cause for the petition. This happens all the more for the reason, that thus it is evident in a very relevant way that this process will never be oral (cf. c. 1690).

Some characteristics of this special process which are common to the documentary process were pointed out previously: in the grounds for determining competence, in the assignments of the active procedural ligitimacy, in the previous objective of the judicial body for the convalidation of the marriage and, moreover, in the relationship to the field of carrying out judicial pronouncements.Regarding the particular norms for this special written process, however, it can be said that these particular norms are rather rare when we consider them in the context of the "ordinary contentious trial," whose norms constitute the legislative substratum in what sustains the particularities of this special process. These peculiarities, which make them special, are the following:

1°) the necessary presence of the defender of the bond on the passive side of the procedural relationship (cf. cc. 1432 and 1433);

2°) the norms of c. 1677 regarding time limits, once the respondent has been cited, for the formulation of the doubt. We shall not delve deeply into the interpretation of this canon, (as well as those canons that will be mentioned next), since they will be reserved to their respective commentary;

3°) the right of the parties through their advocates, the defender of the bond, and the promoter of justice, if he or she intervenes in the process, to be present and to assist in the examination of the parties, witnesses and experts, unless the judge decides that these declarations, testimonies and expert testimony are to remain confidential; as well as their right to know the judicial acts at every stage, even though they are not published, and are able in turn to examine the documents presented by the parties, which we qualify as an important concession of the principle of the publication of the acts, even though it may be limited (cf. c. 1678);

4°) in the matter of proofs, at the same time that special reference is made regarding the value that the evidence and types of proof in these processes can have, in c. 1679 the judicial body is likewise commanded that unless provision is made by other means that the evidence is sufficient and the declarations of the parties must be supported by knowledgeable witnesses; also the judicial body is always obliged to require the proof of experts in cases of impotencce or the defect of consent because of mental infirmity, unless, according to the circumstances, the uselessness of the proof is obvious (cf. c. 1680);

5°) the special regulation of c. 1682 about an automatic appeal of the first instance decision of nullity, urged that there be no delays of the appeal by the ordinary procedure, and at the same time confirming the decision (cf. c. 1641, 1°) with the result of a confirming pronouncement about the nullity so that the litigants can contract a future marriage with other persons (cf. c. 1684);

6°) the possibility of introducing at the appellate level a new allegation for marriage nullity (cf. c. 1683) despite what is stated in c. 1639 § 1 for the ordinary appeal;

7°) one important initiative is proposed, besides the ones already provided for in their general character of c. 1452, in favor of the tribunal which is competent in the process of nullity, namely, to suspend the procedure and to amend the petition, transforming the process of nullity into the procedure for the dispensation from a ratified but not consummated marriage. This can always be done whenever a very probable doubt about the consummation of the marriage arises during the trial and at least one of the spouses requests it (cf. c. 1681).

Regarding all the other features, let them be dealt with by way of a contradictory, with a formalistic technical assistance and procedural representation, with the declaration of the absence of a party in the process, with the presentation and resolution of incidental questions, with the methodical procedures purely for the gathering of and the showing of proofs, with the publication and the conclusion of the case, with the formulation and drafting of the sentence, and even with the extraordinary recourse proper to a new proposition for the cause of nullity, by adducing new and grave reasons or proofs (cf. c. 1644), or with the complaint of nullity (cf. cc. 1620–1627). They will have to be in accord with what is laid down by the *CIC* in pt. II, sec. I, devoted to the "ordinary contentious trial." In reality, c. 1691 prescribes that these processes be regulated in the first place by the special norms and otherwise by those canons about trials in general and about the ordinary contentious trial. One does not have to be surprised, then, that the present written process for marriage nullity is considered in fact like an ordinary trial, in addition to its occupying the greater part of the activity of the tribunals of the Church, within the canonical procedural system, even though it is in a special category and is under the legal heading proper to special processes.

The norm of c. 1691, although included in the heading "General Norms" of art. 7 ch. I (pt. II, tit. I, book VII), is there, however, more by reason of its compliance with what the codal system insinuates, since, despite being situated in the legislative areas of marriage nullity, the strict application of the canon extends to all "cases about the status of persons and for those cases which refer to the public good." It does, however, have a subsidiary character in what refers to the procedure("pertaining to the notion of procedure," says the precept), because there are a multitude of questions that go beyond the procedure, some already pointed out. Others, such as juridic capacity and effect, postulation, the evaluation of proofs, the judicial hierarchy, etc., are for those matters for which the special process has to find basic criteria of a procedural nature in the only place of the *CIC* where one can find them, namely, in those canons "about trials in general and about the ordinary contentious trial." These are areas where the judges and tribunals must be inspired to give the opportune and

necessary solutions for what is missing in the codal legislation of special processes.

c) *The documentary process*

Its regulation is found in art. 6 of the same ch. I (pt. III tit. I, book VII). Consequently, the present process shares with the common written process all "the cases for declaring the nullity of marriage," that is, the norms of art. I ch. I, among them c. 1673, which establishes the criteria of competence, but also that which prescribes the canons of art. 2 with respect to active legitimation. Also among these norms are, c. 1676, in respect to the previous judicial initiative in order to convalidate the marriage if possible, and also in respect to what is treated in cc. 1684 and 1685 about the efficacy of the firm sentence and the execution of this respectively ex officio. There can also be added, as to what can influence it, cc. 1689 and 1691, which are contained in art. 7. Let us look at it specifically:

1°) The special nature of this process is very well defined in c. 1686. It is not to be confused with the oral process, which is excluded by c. 1690 for trying cases of marriage nullity. It necessarily begins with a probatory instrument of an unquestionable documentary nature against which there is no objection nor exception, and in it, the case of the nullity is evident with certitude (a diriment impediment, defect of legitimate form, or the lack of a valid mandate in a marriage through proxy) and which had no intervening dispensation if a case dealt with an impediment. The whole process revolves around the document, which has been presented as being true, in its having been drawn up properly and in the content it records.[3] One prescinds from the formalities opting for speed and immediacy through an appearance of the parties and the defender of the bond before the judge, in this case a one-person body, that the nullity is declared by sentence. The specialness of the process is determined by the evidence that the certain documentary proof presented with the petition offers, and which justifies the speed with which the contradictory is laid out and has to be resolved.

2°) However, joined with the characteristic of the special rapid process as well as its oral and immediate nature, c. 1688 describes it as a process which results in being summary in character. The judge of second instance, in the case of an appeal, after having heard the parties and the defender of the bond will decide immediately if the sentence is to be confirmed. If there is no confirmation of the sentence (and in this resides its summary character, in the sentence not fully rendering the litigious object

3. Regarding the document, cf. C. DE DIEGO-LORA, "Naturaleza y supuesto documental del proceso 'in casibus specialibus'," in *Ius Canonicum* 14 (1974), pp. 221–347; idem, "Consideraciones sobre el proceso 'in casibus specialibus'," in *Ius Canonicum* 21 (1981), especially pp. 319–330; idem, "El proceso documental del nuevo Codex Iuris Canonici," in *Ius Canonicum* 23 (1983), especially pp. 667–670.

as null or valid), the appellate judge does not revoke his or her decision, but sends back the acts to the tribunal of the first instance so that it may study and present the case anew "according to the ordinary process," according to the special written process for the nullity of marriage. That which is prescribed in the canon for the judge of the second instance is applicable, although the norm does not express it,but the same rationale governs, when the judge of the first instance judges that the asserted nullity is not demonstrated in this documentary process, so that, in order to sustain a claim of nullity, the case will have to be processed and judged according to the norms of the special written process.

3°) Canon 1687 § 2 recognizes the right to an ordinary appeal (cf. c. 1629), and § 1 imposes the duty of the defender of the bond to appeal if he prudently considers that the sentence of the nullity is not to proceed, along with his proof, in contrast with what is declared in c. 1682 for the written process. This is, namely, that in the documentary process there should be produced the firmness of the first sentence of nullity in conformance with the general criterion decided by sentence as produced in the ordinary process by c. 1641, 2°–3°, that is to say, by the absence of an appeal in the stipulated useful time period of fifteen days (cf. c. 1630 § 1) and because the second instance expires or is renounced for this case (cf. cc. 1633, 1635 and 1636).[4]

4°) As in every process of marriage nullity the necessary intervention of the defender of the bond, in the passive side of the procedural relationship, is required.

2. *Cases of separation of spouses*

The right to separation is recognized and arises in one of the spouses for producing some of the situations foreseen in cc. 1152–1153. It is the right to a procedural action so that the judicial body may agree to suspend one of the most important effects of marriage, the common life of the spouses. However, ordinarily it affects or transcends the judicial pronouncement favorable to other aspects of the juridic-civil character intimately tied to the existence of a marriage and the new situation that has come to be created through the sentence which puts the spouses in the juridic situation of separated spouses. In contrast with the nullity of marriage, the typical example of the declared sentence, is that in the sentence of separation one creates a new juridic situation, and this denotes its constitutive character.

The effects that are merely civil justify c. 1692 § 3 in its recommending to the ecclesiastical judge that this type of case, when the matter is limited to these effects, and if it is not foreseen that a ruling will be made

4. Cf. C. DE DIEGO-LORA, commentary on cc. 1686–1688, in *CIC Pamplona*.

contrary to divine law, should be brought to the civil forum right from the beginning. Even when it is foreseen that the same sentence of canonical separation will not produce civil effects, the *CIC* permits, with the permission of the competent bishop, one to go directly to the civil courts of the state if there is no fear that their sentences will not be contrary to the divine law (cf. c. 1692 § 2).

a) *The judicial procedure: characteristics*

One of the ways to decide a judicial separation can be through the judicial sentence (cf. c. 1692 § 1).

1°) It can, moreover, always be processed through an oral procedure for which no express petition of the party or of the promoter of justice is necessary so that its processing may follow the way of the ordinary process. Such a special feature resides, then, in the possibility of this procedural option that is offered to the parties, whether these are private or public. Moreover, if the ordinary process is followed for the appeal of sentences, c. 1693 § 2 states that one will proceed to the appeal, *servatis servandis*, according to the norms of c. 1682 § 2, which are provided for the ordinary appeal of the first instance sentence of nullity of marriage. That is to say, the option is made for speed in the appeal; however, we do not understand why the rule has excluded from this rapid process the sentences pronounced in the oral trial, when this trial lacks its own norm for the appeal.

2°) The criteria for the determination of competence are also special. Canon 1694 refers back to those of c. 1673, that is to say, the same criteria as prescribed for the processes of marriage nullity.

3°) Another note indicative of its special feature is the proclamation that makes c. 1696 understood to say that these cases of separation of spouses affect the public good, and in these the promoter of justice must always intervene, under the threat of nullity of the acts should he/she not have been able to accomplish his/her mission before the sentence (cf. c. 1433).

4°) Finally, c. 1695 mandates that the judge employ pastoral means to bring the spouses to a reconciliation and reestablish conjugal life. This does not cease to be a reiteration adapted to this special process, namely, that which is analogously prescribed for the trials of marriage nullity and for every process in general in c. 1446.

5°) The special features of this trial are so rare that, as the particular observation made above indicates (especially as to what appears in chap. II of tit. I of part III), the rest of the case is regulated by the norms of ordinary processes. If the request has been made by the parties, or by the promoter of justice, that the ordinary contentious process be followed, the canons included in sec. I of part II will be applied almost in their entirety to processes of separation. If, however, such a request has not intervened,

this process will be regulated by the canons contained in sec. II of the same part of book VII, those of the oral contentious process.

b) *The administrative procedure*

However, the procedures and the issuance of the sentence in the matter of the separation of spouses can also follow a non-procedural way, that is, extra-judicial. It is simply decided by decree of the bishop (cf. 1692 § 1).

The mention of the *CIC* in this respect is minimal but sufficient. Up to the point when the bishop pronounces his decree, there is not any reference to the steps to be followed. In cc. 1732 ff, in addition to the administrative procedures, norms about the appeals against the administrative decrees are treated. The procedure, therefore, for decreeing the separation of the spouses is not subordinated by the *CIC* to its own proper regulated form, however, the challenge in an appeal against the decree will have to follow the norms established by the *CIC* in the canons included in sec. I of part V of book VII.

We have to remember, however, that if, in the procedural field, the party or the promoter of justice requests that the norms of the oral process be followed, the judge cannot decree that they follow the oral process. By analogy, if any of those parties or the promoter of justice requests that the bishop follow the procedural process, be it the ordinary or the oral process, the bishop will have to keep from admitting the conjugal separation by administrative process.

We have to also consider: a) that the rules of competence of c. 1673 (cf. c. 1694) also affect the determination of the competent bishop who has to decree the separation by administrative method; and b) that in the administrative procedure, under the threat of the nullity of the decree which he pronounces (cf. c. 1433), the promoter of justice necessarily must also intervene in conformity with c. 1696.

3. *Concerning the cases for the declaration of nullity of sacred ordination*

Although these "cases" have a procedural nature in their adjectival process as well as in their substantive process, however, certain anomalies in their norms are such that it is commonly understood to be an ordinary procedure. These peculiarities justify its inclusion within the category of special processes. We can discern the following special aspects: those shown here as procedural anomalies (without our intention, with the use of this term, to give a pejorative nuance to the norm, because such irregular phenomena can result in being utterly justified considering the importance that the litigious object can have for ecclesiastical legislation) which would justify that this process, more than being special, could be classified as exceptional. There are also those other special elements

which are perfectly congruent with a correct procedural activity in this area, though with the addition of a special nature for the needs of the special litigious object.

a) *Unique procedural anomalies*

Regarding the special aspects that qualify as procedural anomalies, we point out:

1°) The active legitimation which is not only that which the cleric who seeks its nullity has, that is to say, that cleric who believes that he holds title to the procedural right of challenging its apparent validity, but also the active legitimation which the bishop upon whom the cleric depends or the bishop of the diocese in which he received his ordination, by which he can challenge its validity, *ius habent*, as c. 1708 states. This can signify a widening of the concept of active legitimation which, going beyond the concept of the right of action, rooted in its title holder, would happen to be attributed, by reason of the public good, to any one of the ordinaries mentioned above.

2°) The libellus, (the official Spanish Translation of c. 1709 § 1 uses, perhaps inappropriately, the word *preces*) which in our judgment has to correspond to the requirements of c. 1504, but does not say to what tribunal it has to be directed. That is to say, in principle, one prescinds in this special process from the ordinary norms of competence assembled in the *CIC*, without there being a previous assignment of this original competence to some tribunal. The petition is sent to the competent Congregation, which has to decide if the case has to be processed by the Congregation itself (it must be understood that it will execute it by administrative procedure), or by a tribunal expressly designated for that, in which case the judicial process is followed. To this norm, c. 1709 § 2 adds one caution: once the petition is sent to the Congregation, the cleric remains prohibited *ipso jure* from the exercise of orders.

b) *Peculiarities that commonly respond to the procedural order, but which imply special aspects*

1°) The tribunal to which the Congregation grants competence is empowered to try the case without issuing any decision about its own competence (cf. c. 1406), and without the capacity to refuse competence, because this competence is not granted by the law (cf. cc. 1405–1415 and 1673), but through an administrative act of the Congregation which is binding.

2°) From that point on, the designated tribunal is to follow the procedural norms of the canons concerning trials in general and of the ordinary contentious process. Even though such a formulation of procedure cannot be considered as special, still qualified as such are the manner and this opening procedure in which this designated tribunal considers itself competent to use the ordinary process for the libellus of the response received

from the Congregation. It seems that, once the said libellus is accepted by the Congregation, the tribunal *ad quem* is prevented from refusing it even if it notices that it does not fulfill some of the requisites of c. 1505 § 2. If it were understood that some of these cases are presented in writing, the judicial introduction will have to make a ruling (c. 1452, within the scope of its norms permits such initiatives), to supply and to complete the deficiencies which it notices in said response.

3°) The necessary intervention in this process of the defender of the bond as directed by c. 1711 is coherent with what is laid out in cc. 1432 and 1433.

4°) The firmness of the sentence of nullity after the second conforming sentence (this has to be deduced because of the silence of the canon and its reference to the ordinary process of c. 1710), pronounced in an ordinary appeal, brings with it as a logical effect what is prescribed by c. 1712, namely, the loss by the cleric of the rights and of all the obligations proper to the clerical state, to which he never truly attained.

III. THE SPECIFICS OF PART III OF BOOK VII IN RESPECT TO WHAT CANNOT BE QUALIFIED TECHNICALLY WITH THE NAME OF PROCESS

In this last section, some references are made to three types of juridical activities, even at times with the intervention of tribunals. But these types must not be technically qualified as processes, although they are found under the section concerning certain special processes. They are:

1. *Cases for the dispensation from a ratified but not consummated marriage*

In the first place, the word "dispensation" calls us to the authority of the Church in the exercise of executive power and not that of the judicial. Indeed, the dispensation remains regulated in those canons included in chap. V of tit. IV of book I, under the general section *de actibus administrativus singularibus*. The administrative act also has an administrative mode of being produced (cf. c. 37). The root of the dispensation lies in a power that is exercised through concession: *concedi potest*, as c. 85 reads literally. Canons 87 and 88 provide the normative prescriptions concerning the ecclesiastical authorities who can concede it. The dispensation from a ratified and non-consummated marriage "is granted only by the Roman Pontiff" (cf. c. 1698 § 2).

In c. 1697 mention is made of a *ius petendi gratiam dispensationis.* The right to request the favor of a dispensation does not give rise to a procedural claim since it is not supported in a ius petendi in iudicio quod sibi (cf. c. 1491). No one can claim that one is owed the solicited favor. The relationship between the one soliciting and the authority to which that person directs the request or petition is directly between the faithful and the hierarchy, and in principle nothing is formalized as a claim before the other, such as would be typical of the judicial petition (cf. cc. 1493–1495 and 1505 ff). If a case were to be initiated with such a claim, the petition will have to be revised (cf. c. 1681). Canon 1699 is significant in revealing to whom the written request soliciting the dispensation is directed.

The prohibition of c. 1701 conflicts directly with the idea of trial, by virtue of which one does not admit an expert in the case. The bishop who receives the request is limited, at the end of the instruction, to sending the acts to the Apostolic See with a votum and the observations of the defender of the bond (cf. c. 1705). The Apostolic See, finally, does not judge nor issue a pronouncement that complies with the requirements of cc. 1611 and 1612 for the sentence. What is more, it does not even identify it with the usual form of judicial decrees, with our without the motivations (cf. c. 1617). Canon 1706 mentions that the rescript from the Apostolic See that concedes the dispensation will be sent to the bishop for the effects that the actual canon indicates. Canon 59 § 1 defines a rescript simply as an administrative act transmitted in writing through the competent authority.

It must then be asked why the special dispensation presented here is considered by the *CIC* as a special process. In our opinion, it is for an historical reason, which is to designate as a process any group or series of acts directed to conduct a specific investigation or to obtain information which is needed for proof, mainly when such a task is assigned to a judge or tribunal. In our case, moreover, not only must there be proved the nonconsummation of the marriage, but also a judgment must be obtained on the part of the Apostolic See about the existence of the just cause to concede the dispensation. The bishop can give the order for such an instruction of the case to the tribunal of the diocese (although he can also entrust it to a suitable priest). If, additionally, a petition for a declaration of the nullity of the marriage preceded it, the same tribunal that was handling it will pursue its investigation for the dispensation (cf. cc. 1700 and 1681). This is aside from the fact that the intervention of the defender of the bond is prescribed (cf. 1701 § 1). All this data comes together in such a way that can serve to confuse the procedure of the investigation with the judicial or contentious process and the exercise of administrative power with the exercise of judicial power. To this is joined the hearing of the spouses that must be held by the instructor plus the fact that for the proofs which such an investigation has to bring to the fore, c. 1702 produces its own method of pointing them out in the ordinary contentious trial. In the cases of marriage nullity, c. 1703 even gives the faculty to the judge to permit the party to be able to present some conclusions.

The probatory instructions can be fulfilled equally in the judicial procedure as in the administrative procedure when these demand a decision or pronouncement about the truth of a fact susceptible of proof. The relationship to the proofs has a more refined regulation in the canons of tit. IV sec. I pt. II, channeled toward the so-called contentious trial. Nothing, however, keeps these norms, *mutatis mutandis*, (prescinding completely from what the proof holds as being contradictory in the process) from being applied to the investigations of a truth of fact which would require a sanction or be presupposed in the administrative act. In an analogous way, some judges and tribunals understood by the legislator for the exercise of judicial power (cf. cc. 1419–1445), can receive, by reason of their technical juridic character, attributions of the authority who exercises legislative power so that they may execute proceedings at the service of the same authority when it acts in its exercise of its executive authority. This would be mostly in a juridic system like the canonical, in which the different powers are attributed to the same titular be it in the universal Church or in the particular Church (cf. 331–333 and 1422; 391 and 1419, respectively).

The external similarities, therefore, between the judicial process and the administrative procedure can cause, at times, inadequate judicial qualifications, which the juridic doctrine, in this case, the procedural, must clarify, giving its exact interpretation about the legislative texts, so that they avoid confusion, which the specific canons are supposed to avoid. For example, it is evident in this way in the procedure for the dispensation, with c. 1699 §§ 1 and 2: when the diocesan bishop finds difficulties of a juridical and moral order in determining the procedure, he then must consult with the Apostolic See. When it is prescribed that, if the bishop rejects the petition, recourse is to be made to the Apostolic See and not to any tribunal of justice of the Apostolic See. Finally, when, having concluded the instruction, the instructor remits all of the acts to the bishop with his report, and the bishop sends all the acts, with his votum, to the Apostolic See (cf. c. 1704) so that it may issue, if it is fitting, an opportune rescript with the dispensation granted (cf. cc. 1705 § 2 and 1706). Consequently, each one of the canons, differentiated in their proper texts according to the purposes they are pursuing, denotes the procedural nature of these juridic interventions, although the whole group of actions are called a trial with a lack of technical precision of the term.

2. *The process for the presumed death of a spouse*

The interventions of the investigation which lead to a declaration of the bishop about the presumed death of a spouse, so that the other party can consider him- or her-self free from the matrimonial bond (cf. c. 1707), have been included in this pt. III, tit. II, within the category of the marriage processes, and in the wider category of special processes.

Everything stated before in relation to the confusion between the judicial process and the administrative procedure has an application to these investigations which are directed toward obtaining from the diocesan bishop the declaration of presumed death.

One cannot speak a priori in these cases, neither from the action nor from the procedural claim, based on the confrontation between the parties, nor does one seek to obtain a judicial sentence, the firmness of which would be law between the parties (cf. c. 1642 § 2), nor does one seek the declaration which the diocesan bishop is going to pronounce in the exercise of his judicial power (cf. c. 391 § 1 together with c. 135 § 3).

This declaration will be preceded by "opportune investigations," and in its own c. 1707 § 2 are mentioned "the declarations of witnesses." Mention is also made of "the reputation," as also of the "clues," various sources of information, some direct and others indirect, which can guide the diocesan bishop in gaining a "moral certitude about the death of the spouse;" but, as c. 1707 § 1 and the section heading of chap. II indicate, it is only a "presumed death."

The concept of presumption is shown to us in c. 1584, in a chapter with the title dedicated to proof in the ordinary contentious trial. But we are not dealing with a presumption *iuris*, (cf. c. 1585) but of a human *presumptio*, which, in being formulated by the declaration of the diocesan bishop in the exercise of his authority, acquires a specific juridic efficacy. This is not to say that this declaration constitutes a an adjudged matter, but precisely that the spouse who is soliciting the said declaration can consider him- or her-self free of the marriage bond and, as long as the contrary is not proven, can contract a new marriage. However, the new marriage will always be threatened by the possibility of there emerging proof to the contrary of what has been declared presumptively by the bishop, and, consequently, such a declaration always remains under the risk (which the new spouses tolerate, as also their own church faces), that such a marriage is null because of the possibility of proving at a future time that the impediment of the bond existed (cf. c. 1085).

The present proceeding for the investigation of presumed death comes, definitively, in order to facilitate, conditionally, in these cases, the fulfillment of the caution which is established in c. 1066. By this it must made be clear that there is nothing obstructing the valid and licit celebration of the marriage of a person who thinks he or she is in a state of widowhood but cannot guarantee such a status for lack of an authentic document, civil or ecclesiastical, which certifies the death of the other spouse.

3. *Ways of avoiding trials*

In tit. III pt. III there is neither a judicial process nor even an administrative procedure. Its systematic appearance in this section must be simply due to the phenomenon of legislative inertia, which was an influence in this title being included, in a certain way, in a parallel position that it held in *CIC*/1917.

We cannot, nor must we, go into those canons that are later studied in their corresponding commentaries. We only wish to note that they would have had a greater standing in a section of the code which would permit them to be related directly with c. 1446, as ways to avoid judicial trials, whether promoted by bishops or directly by judges, but attributed to the power of the disposition of the parties in those cases or litigious matters where the parties freely exercise the power of disposition and where these matters do not pertain to the public good of the church (cf. c. 1715 § 1).

The transaction is a bilateral and onerous contract that the parties who fulfill the requisites of capacity as established by the legislator freely grant or can grant. The arbitration is also another bilateral contract because of which the subjects capable of disposing and of prosecuting decide to remit to the judge of arbitrations the litigious matters that have arisen between them.

There is not a judicial process here, on the contrary, it avoids it, and chances of its even being possible are eliminated by the self-determination of the will of the parties. If the judgment of the arbitrators has to be issued, using trials, it will still not be either administrative or judicial, but it will be a development of the contract of arbitration, which, instead of displaying its efficacy in a single time period, does so in a continuous time period through a series of acts. These are not, then, special process, but are the very debarring of trials. The fact that some juridic systems demand that the decision by arbitration be confirmed by a judge (c. 1716 has an echo of this), does not change the contractual nature of the arbitration, but confirms it in denying direct and binding efficacy to an arbitral decision, which, by not being recognized, would lack the effect of an exception of the *litis finitae* as c. 1462 characterizes it.

TITULUS I
De processibus matrimonialibus

TITLE I
Matrimonial Processes

INTRODUCTION

Joaquín Llobell

1. *Introduction*

The activity of the tribunals of the Church, excepting the dicasteries of the Roman Curia with judicial power, and save for the Roman Rota, is reduced, in practice, to judging the validity of the marriage bond. The statistics are very eloquent in this respect. According to the data of 1991, the diocesan and the interdiocesan tribunals of the Church decided 142,503 cases by way of judgments about marriage nullity, without giving any information about the judicial activity concerning matters distinct from matrimonial.[1] The data takes on greater relevance if one considers that the rest of the activity of the tribunals does not possess a "judicial" nature in the strict sense, because it does not refer to the resolution of a controversy between two confronting parties by an independent body. It is within the competence of the judicial only in so far as it has a way to instruct the acts which will permit the competent administrative authority to adopt a respective decision, which, therefore, will not be a true "sentence" (for example, declarations of canonization, of the dispensation from a ratified but non-consummated marriage, etc.). On the local level, the activity of the different tribunals that have their seat in the vicariate of Rome (seat of the bodies of the Roman Pontiff for the exercise of his power in the diocese of Rome) offers a significant example.[2] In the six years (1985–1990) in which they have published the latest statistics, they

1. Cf. SEC. RATIONARIUM GENERALE ECCLESIAE, *Annuarium statisticum Ecclesiae 1991* (Vatican City 1993), pp. 379–397. By means of the ordinary process: 68,459 in the first instance and 50,448 in the second instance; by means of the documentary process: 23,569 in the first instance and 27 in the second instance.

2. Regarding such tribunals and their different competencies, cf. J. LLOBELL, "Il tribunale di appello del Vicariato di Roma," in *Ius Ecclesiae* 1 (1989), pp. 257–277.

had rendered 1,294 sentences ("*decisioni*"). All but one of those are from the "regional" tribunals of the first and second instance, with exclusive competence over marriage nullity, and only one case is from the "diocesan" tribunal, with competence for other matters.[3] For its part, the Roman Rota, in the "Judicial Year" October 1, 1991–September 30, 1992, dictated 108 sentences: 105 concerning cases of nullity of marriage, one about the admission of a *nova causae propositio* (cf. c. 1644), another a confirmation of an interlocutory sentence and the last, concerning the so-called "*iurium*," over procedural controversies or of a nature distinct from marriage cases.[4] From this statistical data many conclusions can be extracted. At this moment it is of interest to indicate only the importance that the cases of nullity of marriage pose so that the "integrity" of the canonical system is affirmed, which would be "incomplete" (at least in practice) without the exercise of the judicial power (cf. c. 135 § 1).

We must also consider that, "matrimonial processes" (using the terminology of this title of the *CIC*) reflect a part of the existential problematic situation of the marriage of Catholics (also, in lesser measure, as we shall see, of non-Catholics baptized or not) and the criteria with which the ecclesiastic tribunals decide such problems. The analysis of all this "meta-procedural" data goes beyond the extent of this study. They cannot, however, be ignored, because, in fact, they directly condition the use, the abuse and the disuse of the only procedure with which the people of God (pastors and subjects) have experience and, therefore, about what the reflection upon the canonical process constructs in the abstract. For this, in the manner that we consider indispensable, we shall mention those "meta-procedural" realities. For the same reason, we shall center our attention on the cases of marriage nullity since they are the only ones truly "judicial." The matrimonial cases of dissolution of the bond (sacramental or not) are administrative, as we shall see. The cases of separation can be resolved administratively (c. 1692) and, when they are judicial, they use the criteria of determining competence for the cases of nullity (c. 1694), the principal topic of our study. We consider the analysis of other important aspects of the matrimonial process only in so far as we consider it necessary in this introduction to the title of the *CIC*, putting off, for a closer consideration, the study of the canons in which these matterss are raised.

3. Cf. "Attività dei tribunali negli anni 1985–1990," in VICARIATO DI ROMA, *La diocesi di Roma 1991/92. Annuario del Vicariato*, 14th ed. (Rome 1991), p. 750.
4. Cf. *L'attività della Santa Sede nel 1992* (Vatican City 1993), p. 1128.

2. *The declarative nature of the cases for marriage nullity*

The Roman Pontiffs have emphasized that the cases for the nullity of marriage have a declarative, not a constitutive, nature. That is to say, the sentence does not modify the position which the bond of marriage had before the judicial decision.[5]

The "content" of the sentence (that which it "declares") is nothing else but the validity of the bond at the moment of the marriage being celebrated (*matrimonio in fieri*), not the "result," (the success or the failure), which the spouses experience as the reality of their married life (matrimony *in facto esse*). The "motives" (the "headings of nullity") which can render that the marriage bond is null (that it has never existed, although it was "celebrated"), are derived from — to simplify the matter, given the object of our discourse — three types that vitiate matrimony *in fieri*: defects that vitiate consent, impediments and an illegitimate form (cc. 1073–1123).

The declarative nature of the sentences demands, as a presupposition, the acceptance of the magisterium of the Church concerning the indissolubility of marriage (natural and sacramental), concerning the capacity of "normal persons" to marry (which cannot but be the vast majority), and concerning the distinction that exists between the difficulties in the marriage and the inabilities to fulfill the purposes and the properties of marriage, etc.[6] All in all, it is a question of declaring the validity or the nullity of a "reality" of which the "objectivity" has a divine origin, both with respect to the institution (the natural and sacramental marriage) and to the capacity (of the baptized and of those not baptized) to marry. If this magisterium is not accepted faithfully (apart from the difficulties of recognizing the actual validity or nullity), that which the tribunal "declares" could not be the nullity of the bond, but its dissolution. In fact, John Paul II has indicated that the idea of matrimony in some tribunals amounts to the abusive introduction of divorce, "with a different terminology" (the declaration of nullity), in the Church.[7] The Signatura, in its function of vigilance over the activity of the tribunals (c. 1445 § 3, 1°) has put forth a notable effort to remedy these situations. In a document of 1971, the contents of which are still current, the Signatura described some of the erroneous concepts which entail with them the possible dissolution of

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5. Cf., e.g., PIUS XII, *Discorso alla Rota Romana*, October 2, 1944, no. 2, a), in *AAS* 36 (1944), pp. 281–290; JOHN PAUL II, *Discorso alla Rota Romana*, February 4, 1980, nos. 2–8, in *AAS* 72 (1980), pp. 172–178; idem, *Discorso alla Rota Romana*, February 5, 1987, no. 9, in *AAS* 79 (1987), pp. 1453–1459; idem, *Discorso alla Rota Romana*, January 18, 1990, nos. 5 and 6, in *AAS* 82 (1990), pp. 872–877.

6. Cf. the aforementioned discourses of JOHN PAUL II to the Roman Rota and that of 1988 [*AAS* 80 (1988), pp. 1178–1185], 1992 [*AAS* 85 (1993), pp. 140–143, no. 3], 1993 [*AAS* 85 (1993), pp. 1256–1260, nos. 6 and 7] and 1994 (January 28, 1994, in *L'Osservatore Romano*, January 29, 1994, p. 5, *passim*).

7. Cf. JOHN PAUL II, *Discorso alla Rota Romana*, 1980, cit., no. 6.

valid marriages: "The unity of the indissoluble marriage established by Christ is an 'ideal' or a 'desire', but does not have to be considered as a norm or a law on the part of the Christian spouses (n. I/1). Matrimonial consent must not be considered statically, but dynamically, in a way that the spouses perfect it progressively with their love (n. I/2). The spouses who, culpably or not culpably, impede or obstruct the evolution of their interpersonal relationship should be declared free of their marriage (n. I/7). The celebration of the marriage cannot be considered like a contract from which the bond is brought forth, but as a matrimonial initiation which permits conjugal relations and which allows the progressive perfecting of the marriage (n. III/1)."[8] The ecclesiastical magisterium, with synthetic statements more or less explicit, has declared that these concepts are incompatible with the divine will about marriage, such as that God instituted it from the "beginning."[9] In short, the affirmation that the sentences are declarative in cases of marriage nullity calls for acquiescence in the fact that the declared reality has an objective existence, the parameters of which, those of justice, are determined only by God (and declared authentically through the ecclesiastical magisterium) and not by criteria coming from sociology or from modifying moral formulations. This theme constitutes the nucleus of the teaching of the Encyclical Veritatis Splendor, which possesses a remarkable importance for an understanding of what marriage is and, therefore, in understanding the just application of matrimonial procedures.[10] On the other hand, the canonical system is sensitive to the cultural elements compatible with "sound doctrine" in order to determine some invalidating criteria of matrimony, since culture constitutes one of the ways of arriving at a knowledge of humanity's essence and of the natural needs of their dignity.[11]

8. SIGNATURA, "Animadversiones nonnullae significantur Ordinariis locorum Neerlandiae circa ea quae in administranda iustitia urgentius corrigenda sunt et reformanda, December 30, 1971," in I. GORDON–Z. GROCHOLEWSKI, *Documenta recentiora circa rem matrimonialem et processualem*, I (Rome 1977), nos. 41–44.

9. Cf., e.g., "SCDF, Litterae circulares de indissolubilitate matrimonii et de admissione ad Sacramenta fidelium qui in unione irregulari vivunt, April 11, 1973," in SCDF, *Documenta inde a Concilio Vaticano Secundo expleto edita (1966–1985)* (Vatican City 1985), no. 15, p. 48; *FC* 4–10, 77–84; *CCE*, 1601–1617, 1625–1651; CBI, *Direttorio di pastorale familiare*, July 25, 1993 (Rome 1993), nos.189–234.

10. Cf. JOHN PAUL II, *Discorso alla Rota Romana*, 1994, cit.; M.F. POMPEDDA, "Indirizzo d'omaggio rivolto al Papa dal Decano della Rota Romana," January 28, 1994, in *L'Osservatore Romano*, January 29, 1994, p. 5.

11. Cf. VSp, no. 53; J. LLOBELL, "Perfettibilità e sicurezza della norma canonica. Cenni sul valore normativo della giurisprudenza della Rota Romana nelle cause matrimoniali," in PCILT, *"Ius in vita et in missione Ecclesiae". Acta Symposii Internationalis Iuris Canonici, in Civitate Vaticana celebrati diebus 19–24 aprilis 1993* (Vatican City 1994), pp. 1231–1258.

3. *The will of the legislator to entrust the title of judicial power for the cases of marriage nullity.*

The trial is a technical instrument to resolve controversies in a just way, in accord with the truth, and by offering to the parties the possibility to defend themselves before the independent body that issues the sentence. This type of instrument has existed since the beginnings of the juridic experience in oriental cultures (among others, in the Hebrew culture) and was amply developed and perfected by Roman law. Canon law adopted the structure of the Roman process, adapting it to the exigencies of ecclesiastical interests and introducing new elements to make the process an efficient instrument for the accomplishment of the mission of the Church and, as far as possible, simple.[12] As for every technical instrument used in order to obtain complex results, the trial entails a succession of actions that demand an adequate knowledge of the way of performing them and of the objective which one tries to reach (technical expertise). For this it is indispensable that there be persons who have this expertise and that they have at their disposal the time necessary to carry out a considerable task. Judicial duty cannot be discharged by "amateurs" in "free time," although there are persons of very good conduct and who want to do justice, the process demands "professionals." In the Church the judicial power corresponds, by divine law, to the bishops, but since they may not have the required juridical science and the necessary time, the canonical system demands the erection of diocesan tribunals in order to guarantee that these tribunals can efficiently discharge that power in the name of the bishop (cc. 1419–1421; cc. 1086–1; 87 *CCEO*).

The situation of the diocese is very different with respect to the possibility of providing the persons capable of exercising judicial power. Moreover, the trials are frequently extenuated a long period of time, perhaps because of the lack of expertise and the lack of time on the part of the judges themselves;[13] and these delays cause grave harm to the parties. The situation acquires greater drama in the cases of marriage nullity, in which, not rarely one of the parties (or both) hopes that the sentence will declare the nullity in order to be able to contract a new marriage (if the prior marriage did not exist), perhaps with the person with whom they are already living and even with whom they have celebrated a "civil marriage," having previously obtained a divorce. The lack of an adequate solution for these irregular situations produces harm to the rest of the faithful (scandal) and causes problems with respect to the pastoral care of the persons involved, who, if they are living in an adulterous situation from which they

12. Cf. F. D'Ostilio, *I processi canonici. Loro giusta durata* (Rome 1989).
13. Cf. Z. Grocholewski, "Cause matrimoniali e 'modus agendi' dei tribunali," in PCILT, *"Ius in vita et in missione Ecclesiae,"* cit., pp. 947–965; idem, "Processi di nullità matrimoniale nella realtà odierna," in P.A. Bonnet-C. Gullo (Eds.), *Il processo matrimoniale canonico*, 2nd ed. (Vatican City 1994), pp. 11–25.

do not repent efficaciously, cannot receive sacramental absolution nor the Eucharist.[14] The prospect of obtaining the declaration of nullity of the marriage (because of the trial being under way, which is excessively delayed) makes it difficult, in fact, for the success of pastoral measures to help to overcome the immoral situation and to repair the scandal.

After Vatican Council II, in order to mitigate the lack of competent persons and of the time needed for the trial in the *CIC*/1917 and in the *PrM* (for the Churches of the oriental rite *SN*), norms were issued which modified the preconciliar norms and established new matrimonial processes which were more rapid and simple, while laborious procedures were underway toward the reform of the new *CIC*. There was the *motu proprio Causas matrimoniales* (*CM*) (for the Catholics of the Latin rite)[15] and *Cum matrimonialium* (*CMat*) (for those of the Eastern rite).[16] These norms permitted the tribunals of the Church to decide a greater quantity of cases for the nullity of marriage. During the Synod of the Bishops on the family (1980), the Prefect of the Apostolic Signatura indicated that, in some countries, the new norms had produced a case increase of five thousand percent, although this increase not only was due to the new process but, to not a less degree, to the criteria about matrimony according to which the tribunals conceded the nullity, permitting one to speak of the surreptitious introduction of divorce in the Church.[17]

The cases of marriage nullity were the object of strong contrasts in the main stages of the genesis of the *CIC*. It is interesting to point out the propositions proposed repeatedly: to abandon the judicial approach to declare the nullity of marriage by adopting the administrative avenue, and renouncing, therefore, the necessity of the double conformed sentences; to accept the transaction and the arbitrary commitment (cf. c. 1715 § 1); to make it so that any tribunal would be competent over any controversy, prescinding from the titles of competence, or that there would be an accepted forum "of mutual consent."[18] Although some of these proposals did not refer directly to the case of marriage nullity, it is evident, keeping in

14. See note 9.

15. For complete bibliographical references up until 1979, cf. I. GORDON–Z. GROCHOLEWSKI, *Documenta recentiora circa rem matrimonialem et processualem*, I, cit., no. 1260 and Z. GROCHOLEWSKI, *Documenta recentiora circa rem matrimonialem et processualem*, II (Rome 1980), no. 6386.

16. Particular norms were also issued by some bishops' conferences: United States, Canada, Australia, etc. (cf. I. GORDON-Z. GROCHOLEWSKI, *Documenta recentiora circa rem matrimonialem et processualem*, I, cit., nos. 1379–1462; Z. GROCHOLEWSKI, *Documenta recentiora circa rem matrimonialem et processualem*, II, cit., nos. 5445–5498).

17. Cf. "Relatio coram Summo Pontifice de opere Signatura Apostolicae in causis matrimonialibus pro tuenda familia, October 6, 1980," in *Comm.* 12 (1980), pp. 216–219.

18. Cf. *Comm.* 10 (1978), pp. 210–211, 215, 221–222; 16 (1984), pp. 53, 56, 72–73, 77; PCILT, *Acta et documenta PCCICR. Congregatio Plenaria diebus 20–29 octobris 1981 habita* (Typis Polyglottis Vaticanis 1991), pp. 106–110, 230–245, 266.

mind the statistics indicated concerning the activity of the ecclesiastical tribunals, that whoever formulated them was not thinking of such cases.

We can conclude that the *CIC* entrusted the decision of the cases of marriage nullity to the judges, according to the procedural norms and the criteria of competence established there, after a profound reflection of the Code Commission, not through mere inertia, nor through their not having considered attentively other possible solutions. At the same time, the CodCom has indicated that the judicial way is not necessary (nor even is using the documentary process necessary, as is anticipated as being particularly obvious for some nullities: c. 1686), assuming that, being subject to the canonical form, "the person attempted matrimony," that is to say, he celebrated a mere civil rite. In this case, since the form is necessary for the validity of the canonical marriage, the bond could not come into being, and, therefore, the administrative procedure is sufficient to prove the freedom of the ones contracting it (cc. 1066–1067), and, eventually it is sufficient to obtain the permission of the local ordinary (c. 1071 § 1, 2°–3°).[19] For its part, the Apostolic Signatura had already occupied itself to expose the obstructionist maneuvers, which, by prolonging the trials, are damaging the legitimate aspirations for justice on the part of the parties. They also discredit the procedural institution itself.[20]

4. *In respect to the titles of competence in the cases of marriage nullity: the opportunity of modifying the current legal system.*

The system of attribution of competence in the cases of nullity of marriage provided for in 1673 are based, save for the cases reserved to the Apostolic See, upon the concept of "territoriality," a type of relative competence. In studying the different types of competence, we have seen that relative incompetence does not entail the nullity of the sentence, although it is possible to sanction the judge who decides a case while being relatively incompetent (see the introduction to tit. I, book VII, pt. I). The Code Commission of *CIC*/1917 decided to protect the titles of nullity of matrimony by means of the irremediable nullity of the sentence of the incompetent tribunal, the relative incompetency of which (centered upon the criterion of territoriality) becomes absolute, the material criterion predominating over the territoriality, for reasons of the "public order," similar

19. Cf. CodCom, 2nd reply, July 11, 1984, in *AAS* 76 (1984), pp. 746–747; *Comm.* 11 (1979), p. 270.

20. Cf. SIGNATURA, Litt. circ. *De effectibus, quoad exercitium iurisdictionis iudicis competentis, recursus ad Romanum Pontificem*, December 13, 1977, in *AAS* 70 (1978), p. 75: regarding the non suspensive value of recourse to the Roman Pontiff, foreseen in c. 1417 of the *CIC*.

to what the "Austrian Instruction" established (in the year of 1856).[21] This decision of the Code Commission was blocked in successive drafts to the point of disappearing in the final text.

The *CIC* Code Commission, as we have already shown, had to resolve grave problems (theoretical and practical) to affirm these matters: the judicial nature of the cases of nullity of marriage (compared to the proposals of converting it into administrative actions), the binding character of the legal titles of competence, the necessity of the double conforming sentence, etc. In relation to the titles of competence, the Code Commission met with a situation juridically degrading, for which they tried to install a remedy. The "traffic or volume of cases," for example, taken on by some advocates who submitted the cases of their clients to incompetent tribunals, or tribunals with a fictitious competence,[22] because such tribunals (of the first and second instance) offered the security of obtaining two conforming sentences *pro nullitate,* based upon the "incapacity to assume the obligations of marriage," an incapacity which was considered proved by the mere failure of the marriage.[23] In order to remedy this type of abuse, the Commission introduced ex officio § 2 of c. 1488, in which sanctions were established for the advocates who removed the cases from the competent tribunals in order to submit them to others which would judge "in a more favorable manner,"[24] that is to say, that they would "always" declare the sought after nullity. Another problem which the Code Commission had to resolve was that of the "publication of the acts" (c. 1598 § 1), since they wanted to be able to keep the acts a secret, with the consequent violation of the right of defense and the impossibility of knowing the truth, and of presenting proofs contrary to statements of which they are not aware. The motives of such an effort were (and are) fundamentally economic: to avoid the condemnation, on the part of civil jurisdictions, of the tribunals, of the bishops and of the diocese to repair the damage done to one's name caused by the aforementioned affirmations of incapacity which permit them to declare the nullity of the marriage.[25] The current importance of this problem, after the promulgation of the *CIC* is demonstrated by the

21. Cf. *Instructio pro iudiciis ecclesiasticis Imperii Austriaci quoad causas matrimoniales,* §§187–189 and 240. The text and history of this norm can be consulted in S. CIPRIANI, *Instructio matrimonialis Rev.mi Domini de Rauscher archiepiscopi Vindobonensis (1853–1856). Inquisitio historico-juridica* (Rome 1952).

22. Such was the case with the plaintiff of a process, after obtaining the declaration of nullity for his «first» marriage and having celebrated a "second" (cf. sentence c. HUOT, February 6, 1984, no. 9, in *Il Diritto Ecclesiastico* 95/2 (1984), pp. 241–254).

23. Cf. *Documentos de la Signatura sobre causas matrimoniales españolas tratadas en el extranjero,* March 21, 1978, April 22, 1978, December 19, 1979 and January 8, 1980, in «Revista Española de Derecho Canónico» 36 (1980), pp. 71–80; PCILT, *Congregatio Plenaria diebus 20–29 octobris 1981 habita,* cit., pp. 269 and 273.

24. Cf. *Comm.* 16 (1984), p. 61.

25. Cf. PCITL, *Congregatio Plenaria diebus 20–29 octobris 1981 habita,* cit., pp. 469–479.

reference of John Paul II, in 1989, to the necessity to publicize not only the acts, but also the sentence itself.[26]

In relation to the abuses derived from the relative nature of incompetence in these types of cases, it is worth while to remember some interventions of the competent dicasteries. These include: the suppression of the "forum of peregrini in Rome;"[27] the non-existence of the "historical forum," that is to say, that forum originating from a case introduced before a competent tribunal, the instance of which expired or which had been abandoned and there is a desire to introduce the case anew before the same tribunal, which is then not competent at this moment;[28] the declaration of the functional absolute incompetence of the tribunal of first instance (although it possesses any one of the titles of c. 1673) in order to judge, by the same allegation of nullity, a case already decided *"pro validitate matrimonii"* before another tribunal.[29]

These efforts to affirm the necessity of respecting the title of competency in marriage cases were shown to be insufficient, the same as other interventions of the Roman dicasteries which affirmed that some of the requisites demanded by the law condition the validity of the respective title, but they do not change the relative nature of the same (cf. c. 1673, 3°–4°). Such insufficiency is reflected in the recent exhortation of the Roman Pontiff to respect the competent forums.[30] The importance of the matter in question comes primarily from the declarative nature of the respective sentences. The system id designed to guarantee that the competence is exercised by those tribunals (those indicated in c. 1673) that find themselves in circumstances where they know the truth of the validity or the nullity of the bond being discussed. The fact that tribunals exist (whether competent or not) which use unacceptable criteria to declare the nullity of the bond is a non-essential issue, which does not influence in itself the allocation of competence.This sad reality alone emphasizes the importance of protecting such titles in order to keep the violation of the procedural human law (about competence) from effecting the violation of divine law concerning the indissolubility of marriage. The character of the principal issue that is

26. Cf. *Discorso alla Rota Romana*, January 26, 1989, nos. 6 and 7, in *AAS* 81 (1989), pp. 922–927; F. DANEELS, "De iure defensionis. Brevis commentarius ad allocutionem Summi Pontificis diei 26 ianuarii 1989 ad Rotam Romanam," in *Periodica* 79 (1990), pp. 243–266.

27. Cf. *Comm.* 10 (1978), p. 223. This forum was applicable to matrimonial cases: cf. REU, 105; NSSignatura, 18,4° and 91; M. CABREROS DE ANTA, *Comentarios al Código de Derecho Canónico*, III (Madrid 1964), p. 240.

28. Cf. CodCom, Reply, May 17, 1986, in *AAS* 78 (1986), p. 1324. Cf. the commentaries of D.J. ANDRÉS, in *Commentarium pro religiosis* 68 (1987), pp. 308–312; J. LLOBELL, in *Ius Canonicum* 27 (1987), pp. 639–642; A. STANKIEWICZ, in *Periodica* 77 (1988), pp. 168–173; P. TOCANEL, in *Apollinaris* 60 (1987), pp. 403–404.

29. Cf. SIGNATURA, *Declaratio de foro competenti in causa nullitatis matrimonii, post sententiam negativam in prima instantia latam*, June 3, 1989, in *AAS* 81 (1989), pp. 988–990.

30. Cf. JOHN PAUL II, *Discorso alla Rota Romana*, January 18, 1990, no. 7, §4, in *AAS* 82 (1990), pp. 872–877.

not non-essential (guaranteeing, in so far as possible, that the judge will know the truth and that the sentence agrees with it) and its importance for the *salus animarum*, more than for the good procedural order, has brought us to propose the modification of the present legal system by means of the determination, similar to the failed project of *CIC*/1917, of absolute incompetence for the tribunals which are incompetent in a territorial sense for the cases of marriage nullity.[31] The nature of this incompetence prevents any type of "proroguing" which is not effected by the Apostolic Signatura. It also defends respect for the titles of competence with sanctions against the sentence (c. 1620,1°) and not only against the judges and the advocates responsible for the violation of the competent forum (cc. 1457 and 1488 § 2).[32]

5. *The exercise of administrative power in relation to the marriage bond*

The title "Matrimonial Processes" regulates, in addition to the cases judicially declaring the validity or the nullity of the marriage, other "procedures" (better than "trials"), the decision of which enjoys an administrative nature. The procedure "in the Case of the Presumed Death of a Spouse" (c. 1707)[33] and the faculty of the Apostolic Signatura to declare the nullity of matrimony in some exceptional hypotheses possess the same essential character. The cases of separation of spouses can be treated in a judicial or an administrative manner, or they can be entrusted to the civil courts (c. 1692).

a) *The dissolution of the bond in a marriage that is "ratified but not consummated," the "Pauline privilege" and the dispensation "in favor of the faith"*

The matrimonial bond (natural and sacramental) arises from the legitimate consent of the persons who have contracted it (c. 1057). This bond is indissoluble by divine institution. The sacramentality of the marriage between those baptized (a "ratified" marriage), and the consummation between the spouses are elements which add a particular force to the

31. *Cf.*, e.g., J. LLOBELL, "Commissione e *proroga* della competenza dei tribunali ecclesiastici nelle cause di nullità matrimoniale. Sulla natura dell'incompetenza in questi processi," in *Ius Ecclesiae* 2 (1990), pp. 721–740; idem, "Centralizzazione normativa processuale e modifica dei titoli di competenza nelle cause di nullità matrimoniale," in *Ius Ecclesiae* 3 (1991), pp. 431–477. The doctrine accepts the relative nature of the titles on competence regarding the marriage and the consequences stemming therefrom; only one author has suggested a solution similar to ours (cf. A. BERNÁRDEZ CANTÓN, "Tratamiento jurídico de la competencia territorial o relativa en las causas matrimoniales," in *Dimensiones jurídicas del factor religioso. Estudios en homenaje al Prof. López-Alarcón* (Murcia 1987), pp. 65–79).

32. See the the introduction to tit. I regarding the competent forum.

33. Cf. J. FORNÉS, "La regulación canónica de la disolución del matrimonio en el Código de 1983," in *Ius Canonicum* 33 (1993), pp. 607–637.

indissolubility deriving from the agreement effected through the consent, in a way that, when both of these are given cumulatively (a ratified and consummated marriage), the indissolubility is absolute as long as both spouses are alive. However, the bond that is merely natural and the bond that is merely sacramental but not consummated (without forgetting that the consummation perfects the sacramental sign of the marriage between the baptized: the union of Christ with the Church by means of the incarnation, according to a classic theological doctrine), can be dissolved by the Roman Pontiff, in virtue of his particular vicarious participation in the power of Jesus Christ (cc. 1056, 1061, 1141–1143), by means of the application *ex lege* of the "Pauline privilege," and, by way of favor (a dispensation "in favor of the faith" and from the marriage "ratified and non-consummated").

The dispensation from a marriage that is ratified but not consummated requires a series of presuppositions (non-consummation, a just cause, avoidance of scandal), whose existence is demonstrated by means of an administrative procedure (what is addressed is the obtaining of a favor, not the protecting of a right), which is investigated "in a judicial manner" (cc. 1697–1706). This instruction corresponds to the CDWDS (*PB* 67) and belongs to the competent diocesan tribunal, according to the proper norms of this procedure (*see* the commentaries for cc. 1697–1706).

The dissolution of the non-sacramental bond (that in which at least one of the spouses is not baptized) in virtue of the vicarious power of the Roman Pontiff, also requires an administrative procedure, conducted "in a judicial manner," for the concession of such a favor. The dicastery charged with the investigation is the CDF, with the collaboration of the local ordinary, according to its own rules.[34]

b) The declaration of nullity by means of an administrative procedure on the part of the Apostolic Signatura

The principle according to which the cases tending toward a declaration of marriage nullity can only be dealt with and decided in a judicial manner holds one exception.[35] This one exception deals with a manifestation of the *aequitas canonica*,[36] through which the Roman Pontiff has granted to the Apostolic Signatura, originating from the *REU*, to declare

34. Cf. SCDF, *Instructio pro solutione matrimonii in favorem fidei* and *Normae procedurales pro conficiendo processu dissolutionis vinculi matrimonialis in favorem fidei*, December 6, 1973, in EV, IV, nos. 2730–2734 and 2745–2774; A. SILVESTRELLI, "Scioglimento di matrimonio in favorem fidei," in *I procedimenti speciali nel diritto canonico* (Vatican City 1992), pp. 179–216. Regarding the "Pauline privilege," cf. G. GIROTTI, "La procedura per lo scioglimento del matrimonio nella fattispecie del 'privilegio paolino'," in *I procedimenti speciali nel diritto canonico*, cit., pp. 157–177.

35. Cf. R. BURKE, "La procedura amministrativa per la dichiarazione di nullità del matrimonio," in *I procedimenti speciali nel diritto canonico*, cit., pp. 93–105.

36. Cf. M.F. POMPEDDA, "Il processo canonico di nullità di matrimonio: legalismo o legge di carità?," in *Ius Ecclesiae* 1 (1989), pp. 423–447.

the nullity of the matrimonial bond in cases "which do not demand a greater consideration or investigation."[37] According to the practice of the Signatura (cf. c. 19), this exceptional possibility requires a second presupposition, cumulative with the first: that the case cannot be dealt with in a judicial way, normally because of the non-existence of a local competent tribunal.[38] In these cases they proceed without the formal procedural controversy, although it demands the moral certitude about the nullity of the bond (cf. cc. 1060 and 1608), before an administrative body: the "third section" of the Signatura, in virtue of its function of vigilance over the correct administration of justice.[39] Until the *REU*, this function belonged to the SCDS, which also possessed the faculty to declare the nullity of marriage in an administrative manner.

6. *The "moral certitude" of the judges and the "nullities of conscience"*

In the cases of marriage nullity it is possible only "to declare" by the sentence the pre-existing reality. Dealing with the management of an agreement between the objective reality and the content of the judicial decision constitutes the fundamental principle of any procedural and just system. This objective acquires a particular intensity in the canonical process, given the incidence of any sentence (not only in a matrimonial matter) concerning the *salus animarum*. From this principle there are derived different legal institutions which introduce characteristics that are notable along with the civil process: for example, the non-existence of the adjudged matter in the case concerning the status of persons (c. 1643) and the non-peremptory character of time-limits for proposing proofs (cc. 1600, 1609 § 5, 1639 § 2). The idea and the combination of these legal institutions are usually called "*favor veritatis*," which, although impregnating all procedural systems, it possesses some typical expressions of the canonical process.[40]

37. Cf. *CIC* 17 c. 249 §3; *PrM* 2 §4; CodCom, *Reply 2ª, a)*, July 8, 1940, in *AAS* 32 (1940), p. 318.

38. Cf. R. BURKE, "La procedura amministrativa per la dichiarazione di nullità del matrimonio," cit., pp. 99–100 and 104–105.

39. Cf. c. 1445 §3,1°. This section of the Signatura is not a tribunal, but a "dicastery of justice" of the Church, similar to the ministries of state with the same name: cf. Z. GROCHOLEWSKI, "I tribunali," in P.A. BONNET-C. GULLO (Eds.), *La Curia Romana nella cost. ap. Pastor Bonus* (Vatican City 1990), pp. 403–414.

40. Cf. PIUS XII, *Discorso alla Rota Romana*, October 2, 1944, cit.; JOHN PAUL II, *Discorso alla Rota Romana*, February 4, 1980, cit.; J. LLOBELL, "Il patrocinio forense e la 'concezione istituzionale' del processo canonico," in *Il processo matrimoniale canonico*, cit., pp. 439–478.

The “favor veritatis” brings with it the system of free evaluation of the proofs on the part of the judge and the disappearance of the presumptions “*iuris et de iure*” (irrebuttable) in the current procedural system of the Church (cc. 1584–1586, 1608 § 3).[41] To declare the nullity of the marriage, the *CIC* requires, for the issuing of any “condemnatory” sentence (contentious or penal), that the judge achieve “moral certitude,”” (c. 1608 §§ 1 and 4).[42] “Moral certitude” is not a merely subjective state of the judge (or of the tribunal), because it must be based on the acts of the process (c. 1608 § 2), which must have the potential of justifying the decision that is maintained (in the motivation of the sentence: cc. 1611,3°, 1612 § 3, 1622, 2°) and the potential to bring forth the same certitude in the appelate tribunal of.[43]

“Moral certitude,” however, is *judicial*, it must be attained “by” the person (or persons) who must judge the case via the sentence. The judge cannot use a moral certitude “borrowed” from someone who, without being the judge and without possessing the juridical knowledge (this goes beyond any “voluntaristic” system in which justice is identified necessarily with the decision of whoever possesses the power), can offer evaluations coming from the science in which he/she is “expert” (a psychologist, psychiatrist, etc.) about those matters where that expert will possess a “medical” certitude, but not a “juridic” certitude, which is the proper scope of “moral certitude.”[44]

With these postulates, and remembering that the *“favor matrimonii* (c. 1060) and the authentic concept of “moral certitude” hinder from declaring the nullity of the marriage when there exists “some established or reasonable doubt” about the validity of the bond,[45] one must affirm that the current canonical system always permits the declaration of nullity on the basis of the judge attaining “moral certitude,” which can be rooted (in the absence of other proofs) even in the sole declaration of one of the

41. Cf., for the system of the *CIC*/1917, T. GIUSSANI, *Discrezionalità del giudice nella valutazione delle prove* (Vatican City 1977); for the current law, A. STANKIEWICZ, “Le caratteristiche del sistema probatorio canonico,” in *Il processo matrimoniale canonico*, cit., pp. 567–597.

42. Regarding this concept, cf. PIUS XII, *Discorso alla Rota Romana*, October 1, 1942, in *AAS* 34 (1942), pp. 338–343; JOHN PAUL II, *Discorso alla Rota Romana*, February 4, 1980, cit. See the commentary on c. 1608.

43. Cf. J. LLOBELL, “La genesi della sentenza canonica,” in *Il processo matrimoniale canonico*, cit., pp. 700–705 and 720–722.

44. Cf. the discourses of JOHN PAUL II to the Roman Rota in 1987 and 1988, cit.; E. COLAGIOVANNI, “Il giudice e la valutazione delle prove,” in *I mezzi di prova nelle cause matrimoniali secondo la giurisprudenza rotale* (Rome 1995), at press; H. FLATTEN, “Qua libertate iudex ecclesiasticus probationes appretiare possit et debeat,” in *Apollinaris* 33 (1960), pp. 185–210.

45. Cf. the discourses to the Rota of 1942 (no. 1) and of 1980 (no. 6), cits. For a plan not in conformity with that which we have just indicated, cf. J.J. GARCÍA FAÍLDE, *Nuevo Derecho Procesal Canónico*, 2nd ed. (Salamanca 1992), pp. 11–22.

parties[46] or of a single witness.[47] So that any of these probative means by themselves alone, can determine the moral certitude of the judge it is necessary that he or she assemble the requirements (circumstances, clues, other matters, and so forth), so that they may allow the attainment of the juridic qualification of "full proof" (cc. 1536 § 2, 1573, 1679). Such a qualification will have to be justified by the judge in the motivation of the sentence (cc. 1611, 3° and 1612 § 3) and will be able to be challenged by the party (private or public) who does not share this justification. In reality, moral certitude is not a mere subjective state, (an intuition of the judge, although it may be very "intense"),not to be demonstrated "from the acts and the proofs" (c. 1608 § 2) before the parties and before the appellate tribunal. On the contrary, one must deal with a certitude (and, as such, he cannot stop being subjective) that must be "communicable" to all of the persons affected by the sentence in such a way that they will have an adequate knowledge of the matter under discussion and in a "sound judgment," the parties, the appellate tribunal and, in short, the community (ecclesiastical and civil) in which the spouses live whose marriage has been declared null by means of such a certitude. It seems necessary to us to insist upon these ideas, because it is evident that the declaration of the nullity of a marriage, being based only upon the declaration of the parties (or one of them) or of one witness, could be the object of likely abuses if the conditions determined by the law were not respected. That which constitutes full proof is capable of producing moral certitude. The said conditions are not mere "formal" requirements, lacking in pastoral sensitivity, but originate from the presumption of the validity of a marriage legitimately celebrated (respecting the dignity of the persons who have contracted it, whose capacity and sincerity are presumed *except when there is full proof to the contrary*) and of soteriological importance (for salvation) and the social importance of protecting the indissoluble character of the conjugal bond (natural and sacramental).

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46. Cf. cc. 1536 §2, 1679; *Comm.* 11 (1979), pp. 103–104, 263; SCSO, "Instructio servanda in Vicariatu Apostolico Sueciae in pertractandis causis de nullitate matrimonii ex vitiato consensu acatholicorum qui ad fidem catholicam se convertere volunt, ad normam Decreti diei 12 novembris 1947," in X. OCHOA, *Leges Ecclesiae*, III, no. 2222; R.L. BURKE, "La 'confessio extraiudicialis' e le dichiarazioni giudiziali delle parti," in *I mezzi di prova nelle cause matrimoniali...*, cit.

47. Cf. c. 1573; SIGNATURA, "Facultates quoad modum procedendi in causis matrimonialibus concessae Conferentiae Episcopali Belgii," November 10, 1970, in *Documenta recentiora*, I, cit., nos. 1443–1450; idem, "Lettera al Cardinale Arcivescovo di Praga," February 6, 1987, in R. BURKE, *La procedura amministrativa per la dichiarazione di nullità del matrimonio*, cit., p. 105; A. GAUTHIER, "La prova testimoniale," in *I mezzi di prova nelle cause matrimoniali...*, cit.; M.F. POMPEDDA, "Il valore probativo delle dichiarazioni delle Parti nella nuova giurisprudenza della Rota Romana," in *Ius Ecclesiae* 5 (1993), pp. 437–468.

Therefore, it does not appear that it is possible to maintain that pastoral needs permit the so-called "nullity of conscience."[48] The issue, which was raised in the *Plenaria* of 1981,[49] had been denounced by the Apostolic Signatura in this rather rough version: "It belongs primarily to the spouses to judge concerning the worth of their marriage. They will be able to determine personally its validity, because the result is a happy one, either the nullity or the dissolution, because the result is unhappy."[50] In reality, if a tribunal does not manage to attain "moral certitude" about the nullity which is sought by a spouse, as a result of having evaluated his/her declarations and other proofs (if they exist), it is not legitimate to think that such a spouse (with the strong limitations against being just and impartial in a "judgment" of one's own case), or a priest, who cannot have more facts than those which the tribunal has evaluated, can arrive at a morally acceptable decision, different from that obtained by the tribunal (cf. c. 1100). In any case, the problem is difficult; in order not to be wrong in a matter that is so important, there is no other solution possible than to accept the directions of the magisterium, which has entrusted the declaration of nullity of the marriage to the judges of the Church.[51]

7. *The necessity of two conforming sentences "pro nullitate" so that the bond may be considered null.*

In the Ap. Const. *Dei miseratione* (November 3, 1741) Benedict XIV established the need of two conforming sentences *pro nullitate* so that the judicial declarative decision about the nullity of the marriage might allow the parties to celebrate a new marriage. In the same norm the necessity was determined (for the validity of the process) for the presence of the defender of the bond, who *was obligated* to appeal the first sentence *pro nullitate* and *he could* challenge the second conformed sentence. The provisions had been due to the revelation of frequent abuses on the part of some tribunals, which "easily" declared the nullity of marriage: "." The system established by Benedict XIV was introduced into the *CIC*/1917 and through *PrM*. After Vatican Council II, *CM* substituted the obligation of the defender of the bond to appeal the first sentence *pro nullitate* as an obligation of the tribunal, which issued such a decision, to send the sentence

48. CDF, *Carta a los Obispos sobre la recepción de la comunión eucarística de los fieles divorciados vueltos a casar*, September 14, 1994, nos. 5 yr. 8: *AAS* 86 (1994), pp. 974-979; M.F. POMPEDDA, "La questione dell'ammissione ai sacramenti dei divorziati civilmente risposati," in *Studi di diritto matrimoniale canonico* (Milan 1993), pp. 493–508.

49. Cf. PCILT, *Congregatio Plenaria diebus 20–29 octobris 1981 habita*, cit., pp. 232, 273.

50. SIGNATURA, "Animadversiones nonnullae significantur Ordinariis locorum Neerlandiae...," cit., no. I/4.

51. For other attempts to solve the problem, cf. V. FERRARI, "Diritto e morale nella situazione esistenziale dei divorziati-risposati con particolare riferimento all'Italia," in "*Vitam impendere magistero*"..., cit., pp. 335–349.

and the acts of the trial ex officio to the appellate tribunal, without canceling the right of appeal of the parties when they considered themselves wronged by the sentence.[52] The appellate tribunal could issue the second conformed sentence by means of a judicial decision (not administrative), issued in the form of a decree. The *CIC* has incorporated these innovations of the *CM* (cf. cc. 1682–1684). However, the particular rules granted in 1970 to some Anglophone Bishops' Conferences admitted, for cases in which the appeal was "clearly superfluous" (different from those contemplated for the documentary process: cf. cc. 1686–1687), the non-necessity of a conformed second sentence.[53] These particular norms were rescinded with the coming into effect of the *CIC*.

With the requirement for the second decision, the legislator has sought to guarantee "the further inspection of the judgment, done by the tribunal of the higher instance,"[54] as the demonstration of his will to protect the matrimonial bond (*favor matrimonii:* c. 1060). The sending ex officio of the first sentence to the appeal tribunal and the possibility of confirming it by means of a decree manifests solely the desire to avoid unnecessary delays and to avoid the defender of the bond having to feel obligated to appeal against a sentence with which he/she can be in accord, and, at the same time, to feel obligated not to renounce the principle of the need for a double-conformed resolution. The affirmation of this principle brought an extended debate within the Code Commission, since there were insistent proposals to modify it, similar to what the particular norms of 1970 had granted.[55]

We must also note that, the protection of the *favor matrimonii* by means of the need for two sentences involves, according to the disposition of the law, that the same be "conformed." In effect, each "allegation for nullity" (the *causa petendi* pointed out in c. 1641, 1°), involves a distinct legal action, which prevents those respective sentences from being considered "conformed." In fact it is permitted that, in the cases of marriage nullity, a new legal action can be introduced before the appeal tribunal, which will judge the new allegation "in the first instance" (c. 1683). The *newness* of the second action, in marriage cases, can only come from the invoking of a new allegation of nullity, since it is evident that the parties cannot be identical. This would be the spouses, and the defender of the bond, and the promoter of justice, if he makes an intervention. The

52. Cf. J. LLOBELL, "La necessità della doppia sentenza conforme e 'l' appello automatico'" ex can. 1682 costituiscono un gravame? Sul diritto di appello presso la Rota Romana," in *Ius Ecclesiae* 5 (1993), pp. 602–609.

53. Cf. CPEN, *Novus modus procedendi in causis nullitatis matrimonii approbatur pro Statibus Foederatis Americae Septemtrionalis*, April 28, 1970, no. 23 §2, in *Documenta recentiora*, I, cit., no. 1428.

54. *Comm.* 12 (1980), p. 233.

55. Cf. *Comm.* 11 (1979), pp. 266–267; 16 (1984), pp. 73–75; PCILT, *Congregatio Plenaria diebus 20–29 octobris 1981 habita*, cit., pp. 98–127 and 230–278.

identity of the public parties depends on their position in the process, not that they are the same physical persons, cc. 1636 § 2, 1682 § 2. This *newness* comes also from the *petitum* (the bond between those "spouses," of whom the validity is being discussed). These concepts are present in other legal arrangements: in the need to point out the individual allegation of nullity (or allegations), in the decree of the *litis contestatio* (c. 1677 § 3); and in the need to issue a new decree of the *litis contestatio* in order to be able to modify the object of the controversy which had been proposed previously, a need which involves the validity of the sentence (cc. 1514, 1619, 1620, 8°, 1622, 5°). These concepts are present as well in the executive character of the second decision *pro nullitate* which confirms the first (c. 1684), "confirmation," which does not state anything more, being coherent with the whole of the system, than that the second sentence (or decree) is "conformed" with the first, according to the concept of "conformity" used by the *CIC* in cc. 1641, 1° and 1644 § 1. The systematic "proximity" (both canons pertain to the same chapter of *CIC*), demands the interpretive unity indicated in c. 17.

However, there does exist an important doctrinal and jurisprudential tendency according to which the new allegation of nullity, introduced before the appeal tribunal, can have a place in a sentence *pro nullitate* which the same tribunal declares is "conformed" with the sentence issued by the lower court, also *pro nullitate* but for a different allegation. The Apostolic Signatura has indicated that this practice is contrary to the law.[56] In effect, in addition to considering two sentences "conformed" which actually are not (they accept conformity even between two sentences *pro nullitate* the allegations of which are incompatible or contradictory among themselves), this presumed conformity would be given between two sentences of the first instance, since that is the nature of the tribunal of appeal in respect to the new allegation (c. 1683). Consequently, in trying to be coherent with the doctrine which we consider erroneous, it would also be possible to declare conformed where two sentences *pro nullitate* are issued through tribunals both of the first instance (or through the same tribunal). Indeed, because each allegation of nullity gives place to a different legal action, it would be perfectly legitimate to introduce the new legal action before a tribunal of the first instance (the same or another which has one of the titles of competence pointed out in c. 1673), once the previous allegation was decided in the first instance by the sentence (c. 1517) and once its appeal court ex officio or the instance of the party has expired or has been renounced (cc. 1520, 1633, 1636, 1682). Without the need to develop our reasoning any more, we think that one easily understands the notable distortion of the law and of the will of

56. Cf., e.g., SIGNATURA, decision of the Congress, February 10, 1971, in *Periodica* 60 (1971), pp. 315–319; idem, *Reply*, February 1, 1990, in *AAS* 84 (1992), pp. 549–550; J.L. ACEBAL LUJÁN, "La declaración de nulidad del matrimonio de dos acatólicos," in *Revista Española de Derecho Canónico* 49 (1992), pp. 692–697.

the legislator, a distortion which involves this so-called "conformity." Not only would the concept of conformity be distorted but the same sense of the multiplicity of instances, of the hierarchy of the tribunals, of the principle "*ne bis in idem*," and so on.[57]

The problem is not to use "benign" or "rigorous" hermeneutic criteria, or to contrast one "pastoral" system with another "juridical" system. One must accept that the "juridical-canonical activity is, *by its very nature*, pastoral ... Therefore, *any conflict between pastoralness and juridicity is wrong (fuorviante)*. It is not true that to be more pastoral the law must be 'de-legalized' ... The *procedural canonical law* participates in the pastoral character of the law of the Church.[58]" This brings with it the knowledge (with the effort that that study demands) and to respect the precise significance of the concepts and of the procedural institutions (competence, moral certitude, conformity of the sentence, and such), without "emptying them" of their content in their application.[59]

57. Cf. X. BASTIDA, "Congruencia entre el 'petitum' y la sentencia," in J. MANZANARES (Ed.), *Cuestiones básicas de derecho procesal canónico* (Salamanca 1993), pp. 63–91; J. LLOBELL, "Note sulla congruenza e la conformità delle sentenze di nullità del matrimonio," in *Ius Ecclesiae* 2 (1990), pp. 543–564; P. MONETA, "La nuova trattazione della causa matrimoniale," in *Ius Ecclesiae* 3 (1991), pp. 479–497; T. PIERONEK, "Le principe de la double sentence conforme dans la législation et la jurisprudence ecclésiastiques modernes concernant les causes matrimoniales," in *Ephemerides Iuris Canonici* 23 (1977), pp. 237–268 and 24 (1978), pp. 87–113.

58. JOHN PAUL II, *Discorso alla Rota Romana*, January 18, 1990..., cit., nos. 3–7 (emphasis in the original).

59. Cf. JOHN PAUL II, *Discorso alla Rota Romana*, January 30, 1993..., cit., no. 3; idem, *Discorso alla Rota Romana*, January 28, 1994, cit., nos. 2 and 5.

CAPUT I
De causis ad matrimonii nullitatem declaranda

ART. 1
De foro competenti

CHAPTER I
Cases Concerning the Declaration of Nullity of Marriage

ART. 1
The Competent Forum

1671 **Causae matrimoniales baptizatorum iure proprio ad iudicem ecclesiasticum spectant.**

Matrimonial cases of the baptised belong by their own right to the ecclesiastical judge.

SOURCES: c. 1960; *PrM* 1 § 1; *SN* can. 468; *CM* I; *CMat* I

CROSS REFERENCES: cc. 1059, 1401, 1476, 1674,1°

COMMENTARY

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1. The *CIC* introduces in this canon a limitation of c. 1401, 1° ("the Church has its own and exclusive right to judge cases which refer to matters which are spiritual or linked with them"), since the spiritual nature of marriage is evident, its characteristics and its relative rights and essential obligations (both in respect to the constitution of the bond and to the juridic relationship which arises between the spouses) are regulated by divine law (natural and positive), since every valid marriage of two baptized spouses is a sacrament. The norms of divine law, however, about

matters pertaining to civil jurisdiction, equally obligate the civil legislation, the "justice" of which depends directly upon its conformity with divine law.[1] Marriage is an institution of fundamental importance for the civil community, whose very existence depends upon matrimony and upon the family. Therefore, it is evident that the juridic dimension of matrimony is of interest both to the Church and to the state and that the existence of those two jurisdictions gives rise to the "mixed forum." The problem is the limitation and the coordination of both jurisdictions.

2. The first canonical reflections about the topic presupposed a "Christian Society," in a historical context in which the relationships between the Church and the civil authority were regulated according to the criteria of the so-called "Gelasian Dualism" and of the supremacy of the Church.[2] Through this, the Church absorbed the complete jurisdiction over matrimony and over cases of the nullity of the bond and the separation of spouses (these second cases were called "divorce" for many centuries[3]), since the said cases were considered "spiritual" *stricto sensu*, both in the decree of Gratian and in the later Decretals.[4]

3. The Council of Trent (1545–1563) introduced important disciplinary reforms in various aspects in the life of the Church and issued diverse ordinances of a procedural character about marriage. The documents of greater importance concerning our subject were drawn up in the XXIV session. As for what concerns matrimony, it is necessary to distinguish three groups of norms in that session: a) the twelve canones de sacramento matrimonii, b) the Canones super reformatione circa matrimonii, divided into ten chapters, and c) the twenty one canons which included the *Decretum de reformatione*.[5] In the twelve Canones de sacramento matrimonii the power of the Church to dissolve the bond in favor of the faith (c. 5, although it does not deal with sacramental marriage) and in a ratified but not consummated marriage is indicated (c. 6). In the last canon following with canonical tradition, the exclusive jurisdiction of the Church in marriage matters is declared.[6] In the second group of norms

1. Cf. VSp, 84–101; note 11 of the commentary on the title.
2. Cf. J. HERVADA-P. LOMBARDÍA, *El Derecho del Pueblo de Dios*, I (Pamplona 1970), pp. 87–96 and 107–112; *Derecho eclesiástico del Estado Español* (Pamplona 1980), pp. 40–50 and 54–64; INSTITUTO MARTÍN DE AZPILCUETA, *Manual de Derecho Canónico* (Pamplona 1988), pp. 765–773).
3. "*Divortium* quoad torum et cohabitationem" (BENEDICT XIV, *De Syn.*, lib. 9, ch. 9, nos. 3 and 4, cited in P. GASPARRI, *Tractatus canonicus de matrimonio*, II, 3rd ed. (Paris 1904), no. 1452, p. 378). "Causae de *divortio semipleno*" (P. GASPARRI, *Tractatus canonicus de matrimonio*, cit., no. 1457, p. 382).
4. Cf. c. 33, q. 2, cc. 1 and 4; ALEXANDER III, decretal *Lator, X* II, 27, 7; ALEXANDER III, decretal *Ex literis, X* IV, 14, 1; INNOCENT III, decretal *Accedentibus, X* V, 31, 12; HONORIUS III, decretal *Ex parte tua, X* I, 36, 11; GREGORY IX, decretal *Causa restitutionis, X* I, 41, 9.
5. Cf. ISTITUTO PER LE SCIENZE RELIGIOSE (Ed.), *Conciliorum Oecumenicorum Decreta*, bilingual ed. (Bologna 1991), pp. 753–773.
6. "Si quis dixerit, causas matrimoniales non spectare ad iudices ecclesiasticos: anathema sit" (c. 12).

(Canones super reformatione), the first chapter (the famous "*Tametsi*") prohibited clandestine marriages, established the canonical form *ad validitatem* and repeated its insistence upon the exclusive jurisdiction of the Church (chapter 9). The *Decretum de reformatione*, the third normative group of the XXIV session, is the one that offered more relevant information for our study. In effect, c. 20 contains different arrangements about the canonical competence for marriage cases and about other procedural elements. It was affirmed that all cases pertaining to the ecclesiastical forum could be adjudged only in the first instance by those respective tribunals of the Ordinaries of the place. These Ordinaries had to issue the sentence in the time frame of two years from the beginning of the process. The expressions used (*dumtaxat* and *omnino*) indicated, in our judgment, the absolute material incompetence of judges inferior to a diocesan tribunal, since the same c. 20 drew one's attention to the lack of jurisdiction of the deans, the archdeacons and inferior judges, even while they were exercising the right of visitation. Such a declaration of incompetence had retroactive effects upon pending cases, without respect to the *perpetuatio iurisdictionis* and the situation of the *litis pendentia*. In session XXV, in the *Decretum de reformatione generali*, which consists of twenty chapters, there was issued another important rule, from the viewpoint of procedure. In chapter 10, there were created the so-called "synodal judges." In order to facilitate having marriage cases judged by persons technically trained, it was arranged that in the diocesan synods (from which they take their name, c. 1574 *CIC*/1917) or in the provincial councils there had to be designated at least four persons suitable and capable of judging in this type of trial. For the purpose of drawing immediate attention to the correct implementation of this norm, said nominations had to be reported to the Roman Pontiff.[7]

4. Since we cannot detain ourselves by delving further into the history of the subject,[8] suffice it to say that c. 1960 of *CIC*/1917 pointed out that "matrimonial cases between the baptized by proper and exclusive right pertain to the ecclesiastical judge." Article 1 § 1 of *PrM* stated clearly that this exclusive jurisdiction also belonged to the Church when only one of the spouses was baptized. *CIC*/1917 did not regulate specifically the cases of separation of spouses (*PrM* only referred to the causes of nullity). As for the procedural criteria about the separation (the exclusiveness of the ecclesiastical jurisdiction was included: c. 1016 *CIC*/1917), they coincided with the norms about nullity (cf. cc. 1692–1696 *CIC*). However, both *CIC*/1917 and *PrM*, after affirming the principle of "exclusivity," admitted civil jurisdiction in marital cases concerning the "merely civil effects" of marriage (c. 1691 and art. 1 § 2, respectively). Article 1 of *CM* left out its

7. "Decretum de reformatione generali," ch. 10, in *Conciliorum*..., cit., p. 791.

8. Cf. A. ESMEIN, *Le mariage en droit canonique* (Paris 1891), pp. 403–427; F. SALERNO, "Precedenti medievali del processo matrimoniale canonico," in *Il processo matrimoniale canonico*, 2nd ed. (Vatican City 1994), pp. 27–100.

indication of the exclusivity of ecclesiastical jurisdiction, using the same wording of the current c. 1671.[9] The Code Commission based its suppression of the term "exclusive" on ecumenical reasons and on of the polemical tone of the expression, without any reference to civil jurisdiction,[10] although the *Schema* of 1976 (cc. 356–361) already foresaw that the cases of separation could be negotiated before the civil courts. The Code Commission, however, considered it necessary to affirm explicitly the jurisdiction of the Church with respect to the separation of the spouses.[11]

5. The Church is also competent to judge the validity of the marriage of two non-baptized or non-Catholics, one of which wants to contract a new marriage with a Catholic. It belongs to the ecclesiastical authority to give in this situation a judgment about the "free status" of the non-baptized party in order to be able to admit that party to the celebration of the canonical marriage with the Catholic party. This Catholic party, in addition to being held to the ordinary or extraordinary canonical form, from which he/she can be dispensed or exempted (cc. 1116, 1117, 1127), will have to obtain a dispensation from the impediment of "disparity of cult" (c. 1086). Although in these cases, when one of the two spouses is not baptized, it is possible to ask for the dissolution of the bond "in favor of the faith,"[12] it also possible to proceed with the process of marriage nullity before one of the competent tribunals indicated in c. 1673.

6. In pre-codal law, the only competent tribunal to judge the marriage of the non-baptized seemed to be that of the domicile of the Catholic party ("*videtur*," was what was said).[13] In the *CIC* any restriction whatsoever has disappeared for those non-Catholic and non-baptized persons regarding petitioning for the nullity of their marriage (cc. 1476 and 1674,1°);[14] it suffices to have an interest under proper right in the law (cc. 1501, 1504, 2°), which is that of a non-Catholic spouse (or not baptized) who celebrated a legitimate marriage (with another non-Catholic or a non-baptized person). These persons seek their declaration of nullity before the ecclesiastical tribunal in order to be able to celebrate a canonical marriage with a Catholic party (c. 1085 § 2). This hypothesis has been analyzed by the Apostolic Signatura, which has declared the jurisdiction of the canonical tribunal and that it must proceed according to the standards of the *CIC*

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9. Cf. PCCICR, *Schema canonum de modo procedendi pro tutela iurium seu de processibus* (Typis Polyglottis Vaticanis 1976), *praenotanda*, no. 50 [*Comm.* 8 (1976), p. 193].
10. Cf. *Comm.* 11 (1979), p. 256.
11. Cf. *Comm.* 11 (1979), pp. 272–273.
12. See no. 5, a) of the commentary on the title.
13. Cf. F.X. WERNZ, *Ius Decretalium*, IV/2, 2nd ed. (Prati 1912), p. 683.
14. Cf. CIV, *Responsum de iure accusandi matrimonium ab acatholicis*, January 8, 1973, in *AAS* 62 (1973), p. 59.

concerning cases for the nullity of marriage.[15] Therefore, a double conformed sentence *pro nullitate* is necessary, excepting the documentary process in which the sentence of the first instance is executorial once the peremptory time period has lapsed for the appeal (cc. 1686–1688 and 1630).[16] The hypothesis described by the Signatura, in its declaration of 1993, cannot be confused with the mere extrajudicial investigation about the "free status" (cc. 1066–1067) which gives consent, without any judicial process, not even documentary, to celebrate the canonical marriage of one who only "attempted" a previous marriage. In the case of the Catholic spouse (c. 1059), the "attempted marriage" can come from the celebration of marriage before a civil official or before a non-Catholic minister without a dispensation from the canonical form.[17]

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15. Cf. SIGNATURA, "Dichiarazione sulla giurisdizione della Chiesa cattolica riguardo al matrimonio celebrato tra due non cattolici," May 28, 1993, in *Ius Ecclesiae* 6 (1994), p. 366. Cf. SCSO, "Regulae servandae in Vicariatu Apostolico Sueciae in pertractandis causis de nullitate matrimonii," November 12, 1947, in Z. GROCHOLEWSKI, *Documenta recentiora circa rem matrimonialem et processualem*, II (Rome 1980), nos. 5413–5444.

16. Cf. SIGNATURA, *Reply*, February 1, 1990, in *AAS* 84 (1992), pp. 549–550; J.L. ACEBAL LUJÁN, "La declaración de nulidad del matrimonio de dos acatólicos," in *Revista Española de Derecho Canónico* 49 (1992), pp. 692–697.

17. Cf. CodCom, 2nd reply, July 11, 1984, in *AAS* 76 (1984), pp. 746–747; *Comm.* 11 (1979), p. 270; SIGNATURA, "Dichiarazione sulla giurisdizione della Chiesa cattolica," May 28, 1993, cit.; C. DE DIEGO-LORA, "Comprobación de la libertad para contraer matrimonio de los obligados a la forma canónica y no la observaron," in *Estudios de derecho procesal canónico*, IV (Pamplona 1990), pp. 67–79.

1672 Causae de effectibus matrimonii mere civilibus pertinent ad civilem magistratum, nisi ius particulare statuat easdem causas, si incidenter et accessorie agantur, posse a iudice ecclesiastico cognosci ac definiri.

Cases concerning the merely civil effects of marriage pertain to the civil authority, unless particular law lays down that, if such cases are raised as incidental and accessory matters, they may be heard and decided by an ecclesiastical judge.

SOURCES: c. 1961; *PrM* 1 § 2; *SN* can. 469; *CM* II; *CMat* II

CROSS REFERENCES: cc. 22, 1059, 1290, 1401,1°, 1692 § 3

COMMENTARY

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1. Effects of marriage that are merely civil are these: the determination of the indemnification of the damages done to the inheritance by the spouse who is to blame for the nullity, the determination of the amount of the dowry, the right to alimony ahd child visitation for the party does not have custody, and so forth.[1] The previous doctrine of the *CIC* excluded from the civil jurisdiction the determination of the custody of the children and to which of the spouses should be given the exercise of paternal authority.[2] In the current canon law, it is apparent that this case is for a mixed forum and that the Church accepts the civil decision, as long as it is not "contrary to divine law," (c. 1692 § 2). Civil systems that recognize the civil efficacy of the canonical sentence of the nullity of marriage reserve for themselves the jurisdiction over the civil effects deriving from nullity.[3]

2. Does c. 1672 (identical to *CM* 2), refer only to the merely civil effects deriving from the nullity of marriage? Upon consideration of the "rubric" of the respective title of *CIC* ("Cases Concerning the Declaration of Nullity of Marriage") and c. 1692 § 3, the answer would be affirmative. The

1. Cf. P. GASPARRI, *Tractatus canonicus de matrimonio*, II 3rd ed. (Paris 1904), no. 1452, pp. 378–379.
2. Cf. M. CABREROS DE ANTA, *Comentarios al Código de Derecho Canónico*, III (Madrid 1964), pp. 236–237.
3. Cf. S. BERLINGÒ-V. SCALISI (Eds.), *Effetti civili delle sentenze ecclesiastiche in materia matrimoniale* (Milan 1985); V. ORTEGA LLORCA, "Los procesos de crisis matrimonial en la doctrina del Tribunal Constitucional y en la jurisprudencia del Tribunal Supremo," in *Revista General de Derecho* 50 (1993), pp. 11286–11288.

correlative c. 1961 of *CIC*/1917 can be found under the title "Concerning marriage cases," and by this it is clear that the canon was formulating a legal *principle* about the merely civil effects arising from any matrimonial controversy: the nullity of marriage, the separation of spouses, betrothals, the dowry, alimony, hereditary succession, etc. According to the stated principle, these cases belong to the civil judge, without the Church losing its own jurisdiction, the *exercise* of which is only suspended for reasons of procedural economy and of a harmonious relationship between jurisdictions.[4] We think, however, that the rule of c. 1671 of *CIC* also has a self-evident character and that c. 1692 § 3 is a precise resolution of the principle. It was in this way that the matter was asserted within the inner circle of the Code Commission.[5]

3. The canonical cases concerning the separation of spouses do not have civil effects, with some precise exception.[6] Now, the jurisdiction of the state concerning the cases of separation (c. 1692 § 2) is not the same kind that it possesses over the merely civil effects (cc. 1672 and 1692 § 3). For this, regarding the second, there exists a tendency on the part of the Church to waive the exercise of its jurisdiction in favor of the state. With respect to the first, however, given the evident pastoral importance of the separation, the *CIC* demands the intervention of the Church, although it does accept the civil decision, the Church does not want "to be disinterested" in each of these cases (c. 1692 § 2), in which there is present the ecclesiastical public good (c. 1696).[7] For this reason, the remitting to civil tribunals, done by means of particular norms (c. 1692 § 1) or *ad casum*, (§ 2) presupposes the conformity of civil legislation with divine law, the adequate pastoral attention to the spouses and the respect for the right of the faithful to petition the ecclesiastical authority.[8]

4. Concordant countries which recognize the civil effects in canonical decisions about the matrimonial bond usually establish a technical mechanism ("exequatur," delibazione," etc.) by means of which the civil law "makes its own" the canonical decision, whether judicial or administrative (in the case of the dispensation *super matrimonio rato et non*

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4. Cf. the intervention of Card. Palazzini, in PCILT, *Acta et documenta PCCICR. Congregatio Plenaria diebus 20–29 octobris 1981 habita* (Typis Polyglottis Vaticanis 1991), p. 538.

5. Cf. *Comm.* 11 (1979), p. 257; PCITL, *Congregatio Plenaria diebus 20–29 octobris 1981 habita*, cit., pp. 536–538.

6. E.g., in Lebannon (cf. J. PRADER, *Il matrimonio nel mondo* 2nd ed. (Padova 1986), pp. 369 and 374). Cf. CONSORTIUM EUROPÉEN POUR L'ÉTUDE DES RELATIONS ÉGLISES-ÉTAT, *Les effets civils du mariage religieux en Europe. Actes du Colloque Augsburg, 28–29 Novembre 1991* (Milan 1993).

7. Cf. C. DE DIEGO-LORA, "Las causas de separación de cónyuges según el nuevo Código," in *Estudios de derecho procesal canónico*, IV (Pamplona 1990), pp. 107–128.

8. Cf. CBI, *Decreto generale sul matrimonio canonico*, November 5, 1990, nos. 54 and 55, in *Notiziario della Conferenza Episcopale Italiana* 10/1990, pp. 257–279 and in *Ius Ecclesiae* 3 (1991), pp.780–802.

consummato).[9] In its application by the institution which is the recipient of the canonical decision, there are not infrequently some problems stemming from the consideration of such a decision as one coming simply from a "foreign" law. But this consideration seems inexact given the nature of "proper" law for the obligations that have been assumed by means of an international accord.[10] The Church affirms her proper and nonrenounceable "reservation of jurisdiction" over the nullity of canonical marriages in the face of some efforts to recognize the civil tribunals' jurisdiction over said marriages, in so far as they are entered in the civil register.[11] The existence of this "reservation" has been recognized by the Constitutional Court of Italy.[12]

9. Cf. *Concordato entre la Santa Sede y la República de Colombia*, July 12, 1975, a. 8, in *AAS* 67 (1975), pp. 421–434; *Acuerdo entre la Santa Sede y el Estado Español sobre asuntos jurídicos*, January 3, 1979, a. 6,2°, in *AAS* 72 (1980), pp. 29–36; *Accordo tra la Santa Sede e la Repubblica Italiana che apporta modifiche al Concordato Lateranense*, a. 8,2° and *Protocollo addizionale*, no. 4, February 18, 1984, in *AAS* 77 (1985), pp. 521–535.

10. See the commentary on c. 1415, no. 3. The literature on this question is extensive. Cf., e.g., *Concordato e legge matrimoniale* (Naples 1990); E. CAPARROS, "Le droit canonique devant les tribunaux canadiens," in M. THÉRIAULT-J. THORN (Eds.), *"Unico Ecclesiae servitio". Études de droit canonique offerts à Germain Lesage* (Ottawa 1991), pp. 307–342; C. DE DIEGO-LORA, "Nuevas consideraciones sobre la ejecución civil de la nulidad del matrimonio canónico y de la dispensa pontificia del matrimonio rato y no consumado," in *Ius Canonicum* 31 (1991), pp. 533–566; F. LÓPEZ ZARZUELO, *El proceso canónico de matrimonio rato y no consumado. Eficacia civil de las resoluciones pontificias. Doctrina, legislación y formularios* (Valladolid 1991).

11. Cf. the articles, regarding the question, of G. DALLA TORRE and of S. GHERRO in *L'Osservatore Romano*, February 21, 1993, p. 4; the acts of the Congress *Giurisdizione canonica e giurisdizione civile: cooperazione e concorso in materia matrimoniale. Messina, 12–13 novembre 1993*, at press.

12. Cf. the sentence no. 421, December 1, 1993, ponente Mirabelli, in *Il diritto di famiglia e delle persone* 22 (1993), pp. 960–968; G. LO CASTRO, "Il matrimonio fra giurisdizione civile e giurisdizione canonica," in *Ius Ecclesiae* 6 (1994).

1673 **In causis de matrimonii nullitate, quae non sint Sedi Apostolicae reservatae, competentia sunt:**

1° tribunal loci in quo matrimonium celebratum est;

2° tribunal loci in quo pars conventa domicilium vel quasi-domicilium habet;

3° tribunal loci in quo pars actrix domicilium habet, dummodo utraque pars in territorio eiusdem Episcoporum conferentiae degat et Vicarius iudicialis domicilii partis conventae, ipsa audita, consentiat;

4° tribunal loci in quo de facto colligendae sunt pleraeque probationes, dummodo accedat consensus Vicarii iudicialis domicilii partis conventae, qui prius ipsam interroget, num quid excipiendum habeat.

The following tribunals are competent in cases concerning the nullity of marriage which are not reserved to the Apostolic See:

1° the tribunal of the place where the marriage was celebrated;

2° the tribunal of the place where the respondent has a domicile or quasi-domicile;

3° the tribunal of the place where the plaintiff has a domicile, provided that both parties live within the territory of the same Bishops' Conference, and that the judicial Vicar of the domicile of the respondent, after consultation with the respondent, gives consent;

4° the tribunal of the place in which in fact most of the proofs are to be collected, provided that consent is given by the judicial Vicar of the domicile of the respondent, who must first ask the respondent whether he or she has any objection to raise.

SOURCES: cc. 1962, 1964; CI Resp. XIV, 14 iul. 1922 (*AAS* 14 [1922] 529–530); SCDS Instr., 22 dec. 1929 (*AAS* 22 [1930] 168–171); *PrM* 3, 5–8; *SN* cc. 470 et 472; CPAC Rescr., 28 apr. 1970, 7; Signatura Rescr., 2 ian. 1971; *CM* III, IV; Signatura Decr. *Instantia diei*, 6 apr. 1973; *CMat* III, IV; CPAC Rescr. 1 nov. 1974; PCIDSVC Resp., 14 feb. 1977 (*AAS* 69 [1977] 296); Signatura Decl., 12 apr. 1978

CROSS REFERENCES: cc. 1405 § 1,1° et § 3,3°, 1407, 1408, 1411, 1414–1416

COMMENTARY

Joaquín Llobell

1. *Cases reserved to the Apostolic See*

The reservation of competence in favor of the Apostolic See (c. 361) refers only to the cases for the nullity of marriage. Procedures for the dissolution of the bond, therefore, are not contemplated (the decision for this has an administrative nature), although they are also reserved to the Apostolic See. The competence over the cases for nullity of the Heads of State belongs to the Roman Pontiff (c. 1405 § 1, 1°).[1] It makes no difference which of the two spouses (the petitioner or the respondent) possesses this status, which produces a reservation not only before the citation, but also in any moment of the process, annulling the rule of the "perpetuity of jurisdiction" of the tribunal which cited the respondent when neither of the spouses was Head of State (c. 1512, 2°) and the competence of the ordinary tribunals of appeal, when that status is acquired while the cases is at the second instance (cc. 1440 and 1444 § 1), as long as the tribunal has not yet issued the decree of the "conclusion of the case" (c. 1518, 2°). The circumstance of having celebrated the marriage while being the Head of State, and having done so before the beginning of the process, or of one having a legitimate expectation of becoming Head of State (for example, the hereditary princess or prince) does not give rise to such a reservation. It is necessary that one of the spouses be the Head of State at the moment of initiating the process, or that he or she acquire such a status while the cause is *sub iudice*. However, the "*perpetuatio iurisdictionis*" does come about if the process has been taking place before the Roman Pontiff (or before the tribunal designated by him), when the person loses his position as Head of State, even through his death (c. 1675 § 2). In the consideration that the determining criterion of the reservation is the *actual* condition of said status, the reservation does not come about in the assumption of c. 1675 § 1, although it always possible to petition the Roman Pontiff as pointed out in c. 1417 § 1 (which can make it possible for the reservation pointed out in c. 1405 § 1, 4° to take place). It would also be possible to invoke the reservation *post mortem* (c. 1675 § 1) when the condition of the Head of State who would have challenged the marriage would have depended upon the validity of the dissolved marriage because of the death of one or of both spouses. Normally it will not be the Roman Pontiff who will issue the sentence, but he will entrust the instruction and the decision of the case to delegated judges, by means of an act of "commission" of competence. If the act of the commission of competence of the Roman Pontiff

1. One author considers that presidents are also subject to the discretion of the Roman Pontiff: cf. P. MONETA, *La giustizia nella Chiesa* (Bologna 1993), pp. 79–80.

does not provide for the tribunal of appeal (also delegated), the sentence of the first instance will not be appealable (c. 1629, 1°) and, therefore, is executory. *Ex iure* the two conforming sentences will be necessary, if an appeal is possible before another *turnus* of the same Rota, only when the commission is in favor of the Roman Rota, in so far as it is the tribunal *a se* and not in favor of some rotal judges *intuitu personae* (c. 1444 § 2).

The Roman Rota is competent in first instance for the cases of nullity of marriage of persons "who do not have a superior other than the Roman Pontiff" (c. 1405 § 3, 3°), as could happen in the case of a lay president (woman or man) of a public international association (c. 312 § 1, 1°).[2] The cases reserved to the Roman Rota do not have other procedural rules (other than those provided in their *lex propria*),[3] which does not change the general structure for cases for marriage nullity. The cases reserved to the Apostolic See by reason of the juridic condition of the persons determine a subjective competence of an absolute nature ("major cases"), the violation of which causes irremediable nullity of the sentence (cc. 1406 and 1620, 1°).

In the universal Latin legislation, the Roman Rota has the functional exclusive competence for the third or final instance. Therefore, save for the commission carried out through the Apostolic Signatura in favor of a local tribunal,[4] the *nova causae propositio* to challenge the double conformed sentence (c. 1644) demands recourse to the Roman Rota. This competence is also absolute.

The Rota of the Apostolic Nunciature in Spain modifies the functional competence of the Roman Rota in the cases of marriage nullity (not where "major cases" are the subject), for these reasons: because it is the tribunal of the second instance (in some cases) and of the third and final instance for Spanish tribunals when none of the parties have appealed to the Roman Rota.[5]

2. *The "forum of the place of the celebration of the marriage"*: c. 1673, 1°

Marriage obviously has to be celebrated in some place: in the ordinary or extraordinary form or with a dispensation from the form. By exception, it does occur, in some of the suppositions that would permit the

2. Cf. J. OCHOA, "I titoli di competenza," in P.A. BONNET-C. GULLO (Eds.), *Il processo matrimoniale canonico* 2nd ed. (Vatican City 1994) p. 145.

3. Cf. c. 1402; *PB* 130; NSRR, April 18, 1994.

4. See the commentary on the title "The Competent Forum" (cc. 1404–1416).

5. Cf. mp *Nuntiaturae Apostolicae*, October 2, .1999, in *AAS* 92 (2000), pp. 5-17, arts. 37-38. For the former discipline cf. PIUS XII, mp *Apostolico Hispaniarum Nuntio*, April 7, 1947, a. 41, in *AAS* 39 (1947), pp. 155–163; TRR, Decr., October, 19 1953, in X. OCHOA, *Leges Ecclesiae*, III, no. 2375; SEC, Decr., January 22, 1954, in ibid., no. 2414; SIGNATURA, Decr., June 17, 1972, in ibid., IV, no. 4062; *PB*, 124,2°.

extraordinary form (c. 1116),where the said place is not subject to the jurisdiction of any of the titulars of proper judicial power. However, for cases in general, the diocesan bishops and their equivalents and their tribunals do have the competence to judge the validity of marriages celebrated in the territory of their jurisdiction. The competence about the place can belong to the diocesan or the interdiocesan tribunal (cc. 1420 and 1423). When the nature of the jurisdiction is personal, c. 1110 indicates that, "by virtue of their office they assist, within the confines of their jurisdiction, at the marriages only of those of whom at least one party is their subject within the limits of their jurisdiction." In the case of Military Ordinariates, to assist at the marriage of a subject forms part of the proper personal extent of jurisdiction (cumulative with that of the territorial limits), independently of having to have the marriage celebrated in any of those places where the jurisdiction would also be territorial (the curia of the Ordinariate, military chapels, etc.) However, the tribunal of the Ordinariate will only be competent by the title that we are considering when the marriage has been celebrated in one of the places subject to the territorial jurisdiction of the ordinary, cumulatively with the tribunal of the local ordinary.[6]

It is traditional to place this forum on the same level as that of the contract (c. 1411 § 1), given that the consent of the contracting persons is the efficient cause of the marriage. Aside from the difficulties on the part of doctrine to accept the contractual nature of the marriage,[7] c. 1673, 1° is a special law that derogates from the general law so that the contractual determination of the competent tribunal foreseen in c. 1411 § 1 is not possible. In the consideration, however, that every tribunal is competent to judge in first instance the marriages celebrated in its own territory, with those exceptions coming from the reservations provided for in cc. 1420 § 2 and 1423 § 2, the nature of its competence (and incompetence) will be only territorial, and, therefore, relative. Thus, the sentences issued for cases in which it is incompetent are illegitimate but valid. The consideration applies equally for the titles of nos. 2°–4° of c. 1673, with the peculiarity that the determination of these last ones, as we shall see shortly, is less simple than that of the place of the celebration by the fact that, in addition to demanding more attention of the judge about the proof of the title invoked in the petition (cc. 1502, 1504, 1°, 1505 §§ 1 and 2, 1°), can be used fraudulently, without the fraud being sufficiently sanctioned (c. 1620,

6. Cf. *SMC*, 4, 5, 7, 13, 6° and 14; ORDINARIATO MILITARE IN ITALIA, *Costituzione del tribunale di prima istanza*, October 7, 1988, in *Bonus miles Christi* 1988/5, p. 354; E. BAURA, "L'ufficio di Ordinario militare. Profili giuridici," in *Ius Ecclesiae* 4 (1992), pp. 408–413; A. VIANA, *Territorialidad y personalidad en la organización eclesiástica. El caso de los ordinariatos militares* (Pamplona 1992), pp. 197–205, 224–230, 247–250.

7. Cf. J. CARRERAS, "L'antropologia e le norme di capacità per celebrare il matrimonio. I precedenti remoti del canone 1095 *CIC*'83," in *Ius Ecclesiae* 4 (1992), pp. 79–150; J.F. CASTAÑO, "Il matrimonio è contratto? (quaestio disputata)," in *Periodica* 82 (1993), pp. 431–476.

1°). For this reason we propose that the titles of numbers 1°–4° of c. 1673 defer to absolute territorial competence, and fraud in this area would cause the nullity of the sentence (c. 1620, 1°).

3. *The "forum of the respondent"*: c. 1673, 2°

The second territorial title is what we call the "general forum," that of the domicile or the quasi-domicile of the respondent (c. 1408), in the application of the principle "*actor forum rei sequitur*" (c. 1407 § 3). Since there are always other alternative forums, in the cases of marriage nullity, in the current law, one may not invoke the "ancillary forum" of the *vagus* (c. 1409 § 1).[8]

Down through many centuries, the only titles of competence for marriage cases were those pointed out in these two first numbers of c. 1673, although the forum of the respondent had various limits and complications arising from the specific canonical situation of the woman (who, for marriage cases, could not have a proper domicile or quasi-domicile distinct from the man, save for those cases of legitimate separation and of the Catholic woman married to a non-Catholic) and of non-Catholics (who have stiff restrictions upon their legal standing).[9]

The forum of the quasi-domicile established in the CIC/1917 was used frequently in a fraudulent way in order to introduce a case of nullity of marriage before a tribunal which with difficulty could prove the veracity of the proofs presented by the private parties and, consequently, could more easily be persuaded to declare the nullity of the bond in a way contrary to the truth. These abuses were the motivation, in 1929, for the promulgation of an instruction in which, after describing the gravity of the problem (it ran the risk of introducing divorce into the practice of the Church), detailed precautions were prescribed for the acceptance of the petition (which would have to be rejected in favor of the tribunal of the domicile or the place of the celebration of the marriage) and made the defender of the bond responsible for the conduct of the tribunal on the matter.[10] *PrM* dedicated its entire article 5 to calling attention to compli-

8. In a different sense, cf. J. OCHOA, "I titoli di competenza," cit., p. 153.

9. Cf. CodCom, *Responsa I et XIV*, July 14, 1922, in *AAS* 14 (1922), pp. 526–530; *PrM*, 6–7, 35–39; F. DANEELS, "Il diritto di impugnare il matrimonio," in *Il processo matrimoniale canonico*, cit., pp. 394–397; R. RODRÍGUEZ-OCAÑA, "El derecho de acción procesal de los apóstatas en el Código oriental," in *Ius Canonicum* 28 (1988), pp. 219–230.

10. "In tam effrena divortiorum cupiditate hodie invalescente, quae efficit ut...ipsos catholicos coniuges facile abripi desiderio nuptias dissolvendi...": *SCDS*, Instr. *de competentia iudicis in causis matrimonialibus ratione quasi-domicilii*, December 23, 1929, exposition of motives by Card. Lega, in *AAS* 22 (1930), pp. 168–171. The Instr. republished as an appendix to *PrM*.

ance with the norm of 1929 and, in 1940, the CodCom defined exactly some aspects of the competence of the SCDS in respect to the quasi-domicile.[11]

Causas matrimoniales 4 profoundly changed the criteria of the attribution of competence established in *CIC*/1917 and in *PrM* § 1, b) and substituted the forum of the domicile or quasi-domicile of the respondent for that of the "*commoratio non precaria*" (not a mere temporary and unstable residence), of the same party. The new title provoked many doctrinal investigations upon its meaning and proof, and gave rise to similar abuses (but more extensive), of those who justified the instruction of 1929 and other instructions coming about because of the existence of tribunals which, in the terminology of the current c. 1488 § 2, define a case "in the most favorable manner.[12]" To mitigate this situation, the *CIC* returned to its preceding terminology, although the same Code Commission revealed that, with the concept of the quasi-domicile of the new c. 102 § 2, the title is understood with greater ease than that of the "*commoratio non precaria*."[13] For this reason, we share the opinion that, although it is evident that the instruction of 1929 about the forum of the quasi-domicile is not still in force, the judges and the defenders of the bond must act with its spirit.[14]

The respondent can have various domiciles and quasi-domiciles in different dioceses, with the result that all of the respective tribunals are concurrently competent because of this title. The multiplicity of parochial domiciles in the same diocese makes no difference. In the case of spouses who are under a guardianship or under a curator, the domicile and quasi-domicile determining competence are those of the guardian or proxy, the situation can give rise to a plurality of competent tribunals.[15] The determination of competence among the contending tribunals is made according to the criterion of the institute of prevention (c. 1415), and this is the source of the "perpetuation of jurisdiction" (c. 1512, 2°)[16] since it makes no difference that there may be a change of domicile or of quasi-domicile taking place after the citation.

4. *The "forum of the petitioner"*: c. 1673, 3°

The forum of the petitioner constitutes, in the general discipline about competence, a "subsidiary" title (c. 1409 § 2), applicable only in the absence of any other forum. In marriage cases, however, this forum is

11. Cf. CodCom, Replies 1 and 2, July 8, 1940, in *AAS* 32 (1940), pp. 317–318.
12. Cf. J. OCHOA, "I titoli di competenza," cit., pp. 149–151; sentence c. HUOT, February 2, 1984, in *Il Diritto Ecclesiastico* 95/2 (1984), pp. 241–254, no. 9.
13. Cf. *Comm.* 10 (1978), p. 222; 11 (1979), p. 258.
14. Cf. J. OCHOA, "I titoli di competenza," cit., pp. 154–155.
15. Cf. ibid., pp. 150–153; see the commentary on c. 1408.
16. Article 8 of *PrM* explicitly indicated the effect of the "perpetuatio iurisdictionis".

ordinary and concurrent with the other three provided for in c. 1673. The forum of the petitioner constitutes an important innovation, at a universal level (cf. c. 1359 *CCEO*), in the system of marriage competence. The most recent antecedent on the forum of the petitioner, not provided for in *CM* nor in *CMat*,[17] is found in the special norms given to the Bishops' Conferences of the United States, Australia, England, Wales and Canada (1970–1974).[18] However, the forum of the petitioner was already provided for in the pre-codal norms, in *CIC*/1917 (c. 1964) and in *PrM* 6 § 1 and 7 as an alternative forum with that of the place of the celebration for some assumptions, as a consequence of the restrictions cited about the capacity of the woman (to acquire her own domicile) and of the non-Catholics and apostates (to challenge the marriage). The Code Commission was entrusted with the elaboration of the *CM*.[19] The identity of the redactors explains the absence of the forum of the petitioner in c. 337 of the *Schema* of 1976. After sending this *Schema* to the consultative bodies, there were numerous requests to include the forum of the petitioner as a title of competence for marriage cases, and the Code Commission approved such an inclusion unanimously in 1979.[20]

The constitutive elements of the forum of the petitioner are:

1°) Only the domicile of the petitioner is accepted, not the quasi-domicile. The norms for the Bishops' Conferences of the United States and Australia of 1970 accepted the forum of the residence of the petitioner (no. 7).[21]

2°) Both spouses must have a "domicile" in the territory of the same bishops' conference, since the term used through the *CIC* (*degat*) "means, in its context of c. 1673, 3°, a *true domicile* that is canonical on the part of both and that the petitioner and the respondent have their respective diocesan domicile in different dioceses, but belonging to the canonical territory of the same bishops' conference."[22] The origin of this stipulation also proceeds from the negative experience of the norms of 1970.[23] The *Schema* of 1980 indicated that the spouses had to reside in the same

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17. Cf. SIGNATURA, "Decisio de incompetentia tribunalis declaratur ad videndam causam nullitatis matrimonii ex eo quod fundabat competentiam in commorationem partis actricis," June 21, 1974, in X. OCHOA, *Leges Ecclesiae*, V, no. 4305.

18. Cf. I. GORDON-Z. GROCHOLEWSKI, *Documenta recentiora circa rem matrimonialem et processualem*, I (Rome 1977), nos. 1379–1462; Z. GROCHOLEWSKI, *Documenta recentiora circa rem matrimonialem et processualem*, II (Rome 1980), nos. 5445–5498.

19. Cf. *Comm.* 6 (1974), p. 41; A.M. LÓPEZ MEDINA, "La competencia en razón del domicilio de la parte actora," in *Ius Canonicum* 26 (1986), pp. 751–795.

20. Cf. *Comm.* 11 (1979), pp. 257–259.

21. Cf. *Comm.* 16 (1984), pp. 72–73.

22. J. OCHOA, "I titoli di competenza," cit., pp. 159–161.

23. Cf. SIGNATURA, "Litterae ad Praesidem Conferentiae Episcopalis Mexicanae," April 12, 1978, in *Documenta recentiora*, II, cit., nos. 5456–5462; Z. GROCHOLEWSKI, "Declaration of the Apostolic Signatura on the Competence of Ecclesiastical Tribunals in the United States of America," in *Monitor Ecclesiasticus* 104 (1979), pp. 142–159.

"nation" (c. 1625). In 1981, this reference to the territorial extent of the domicile of the parties was modified, the concept of "nation" was substituted by that of the "bishops' conference," since some Conferences exist which include various nations.[24] The origin of this requirement permits the affirmation that, when in one nation (for example, Italy) there are regional bishops' conferences, the territory considered by the *CIC* is the national, not the regional.

3°) The consent of the judicial vicar of the tribunal in whose diocese the respondent has his domicile (not his/her quasi-domicile) must be given. This requirement takes its origin in a "modification" of no. 7 of the cited norms of 1970, which did not provide for any intervention of the respondent nor of "his or her" judicial Vicar.[25] The *Schemata* of 1980 and of 1982 determined, without greater precision, that the consent should correspond to the "tribunal of the domicile of the respondent," it was the Commission restricted to experts, who advised the Roman Pontiff in the final examination of the *Schema* of 1982, which indicated that the consent belonged to the Judicial Vicar. In 1986 the Code Commission declared that, in the hypothesis of the non-existence of the diocesan Judicial Vicar (of the domicile of the respondent), the consent belongs to the diocesan bishop, not to the judicial Vicar of the interdiocesan tribunal.[26] In this way the intention was to facilitate the possibility that whoever had to give the consent could consult (by himself or through somebody reliable, for example, the respective pastor) the opinion of the respondent (requirement 4°).

If one does not know the domicile of the respondent:

a) It does not appear that no. 2° of c. 1673 can be invoked, although there is alleged that said party has the domicile or the quasi-domicile that is "common" (the "conjugal domicile" of c. 104), since the presumption, in such a supposition, is that "the intention of not returning" exists (c. 106), although there may not be the "just cause" provided for in c. 104.[27] In any case, it would not be the competent forum provided for in no. 3° (forum of the petitioner), but that indicated in no. 2°.

b) Article 4 § 1, c) of *CM* established the forum "of the place in which in fact most of the declarations and proofs are to be collected" (cf. c. 1673, 4°). In order that this forum "exist" (the norm says "*dummodo*," the cumulative approvals of the local ordinary of the "habitual residence" of the respondent and of the president of the tribunal before which the petitioner

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24. Cf. *Comm.* 16 (1984), p. 72. One member of the Commission proposed a measure to facilitate the application of the forum of the plaintiff (cf. ibid., pp. 72–73).

25. Cf. CPEN, "Epistula ad conferentiam episcopalem Statuum Foederatorum Americae Septemtrionalium," June 20, 1973, in *Documenta recentiora*, I, cit., no. 1437.

26. Cf. CodCom, *Responsio ad propositum dubium in plenario coetu diei 28 februarii 1986. Summus Pontifex Ioannes Paulus II die 17 maii 1986 eam publicari iussit*, in *AAS* 78 (1986), p. 1323; J. LLOBELL, "Acción, pretensión y fuero del actor en los procesos declarativos de la nulidad matrimonial," in *Ius Canonicum* 27 (1987), pp. 625–639.

27. For a contrary opinion, cf. J. OCHOA, "I titoli di competenza," cit., p. 168.

was presenting his/her petition is necessary. Moreover, article 4 § 2 indicated, without defining exactly the nature of the new requirement (*ad validitatem* or *ad liceitatem*), that the tribunal "of the place of the proofs" had to ask the respondent if he had any objections against the introduction of the case before the same interrogating tribunal. In 1973, the Apostolic Signatura issued a special decree according to which, when the residence of the respondent was not known, the forum "of proofs" could be applied without the consent of the local ordinary of the respondent and, implicitly, without the tribunal "of the proofs" interrogating the respondent.[28] The Signatura considered that the facility to instruct the case in the forum "of the proofs" pertained to the "public interest," while, through the impossibility of obtaining the consent of the local ordinary of residence on the respondent it could only be prejudicial to the "private interest" of such a party, through the fact that the "public interest" must prevail. In reality, aside from the debatable evaluation of considering the right of defense of the respondent as "private," this response of the Signatura affirmed the validity and the legitimacy of a title of competence for which there was lacking, in the concrete case being considered, an element demanded by the norm *ad validitatem*.

These considerations about a norm (*CM*) which had been derogated by the *CIC* and by a special decree of the Signatura (of 1973) are pertinent because one of the most prestigious scholars of the canonical process, and, in particular of the competence in marriage cases, uses these pieces of information to affirm that the forum provided for in c. 1673, 3° is applicable when one cannot obtain the consent of the Judicial Vicar of the Respondent whose domicile is unknown.[29] This interpretation, however, is contrary to the literal tenor of the law, which considered as necessary for the valid existence of this title of competence each one of the four conditions that we pointed out. If there is one of those missing, the title does not exist as such, in the same way that the tribunal of a diocese in which the marriage was not celebrated will never be competent by the title in c. 1673, 1°. The Apostolic Signatura, through a declaration and a general executive decree (cf. cc. 31–33), has insisted that the title does not exist ("non est forum iure competens") without the conditions provided for by c. 1673, 3°–4° (for the forum of the proofs, which we shall study next).[30] The "burden" of asking for the consent belongs to the petitioner, who

28. Cf. SIGNATURA, "Decretum de foro competenti in causa nullitatis matrimonii," April 6, 1973, in *Documenta recentiora*, I, cit., nos. 1299–1301.

29. Cf. J. OCHOA, "I titoli di competenza," cit., pp. 168–170.

30. Cf. SIGNATURA, Decl., April 27, 1989, in *AAS* 81 (1989), pp. 892–894; idem, Resp. May 6, 1993, in *AAS* 85 (1993), pp. 969–970. For some commentaries regarding the first document, cf. J.L. ACEBAL LUJÁN, "El fuero competente," in *Revista Española de Derecho Canónico* 47 (1990), pp. 199–214; F. DANEELS, "Brevis introductio ad declarationem Supremi Signaturae Apostolicae Tribunalis de foro plerarumque probationum," in K. LÜDICKE-H. MUSSINGHOFF-H. SCHWENDENWEIN (Eds.), *"Iustus Iudex". Festgabe für Paul Wesemann zum 75. Geburtstag von seinen Freunden und Schülern* (Essen 1990), pp. 401–414.

must show the document (cf. c. 37) of concession when presenting his or her petition to the tribunal of his/her domicile, without whose consent he or she is incompetent (cf. c. 1502). However, the tribunal can be directed ex officio to the Judicial Vicar of the respondent, without rejecting the petition, but without citing the respondent until receiving his consent.[31] Silence cannot be interpreted as consent.[32]

4°)The Judicial Vicar of the domicile of the respondent must consult this party. We are dealing with guaranteeing, immediately, the right of defense by means of guaranteeing that the tribunal of the petitioner can use all means of proof to judge the case according to the truth. The opinion and the reasons of the respondent, as well as his voluntary silence, must be held in consideration for giving or denying consent, but they do not determine it univocally. In the document of May 6, 1993, the Signatura has declared another specific, one already indicated in the law but ignored in practice by some tribunals. This is that the consent must be given after having heard the respondent (through him personally or through another)[33] having evaluated (now personally) not only what this party has said (or has been silent about), but also the other circumstances of the case. The evaluation, together with all these pieces of information will be used by the judicial Vicar to give or to deny his consent, in the second supposition it will not defer to the forum of the petitioner. A consent given without having listened to the respondent will bring about the violation of the diligence required by c. 127 § 3, as the Signatura pointed out, but, above all, the act will be null by reason of the lack of an essential requirement (c. 124 § 1) and by reason of the disposition of c. 127 § 2, 2°. The nullity of consent will result in the tribunal not being competent by this title

5°) *The "forum of the proofs,"* : c. 1673, 4°

The cited norms of 1970 for some bishops' conferences established the forum of the tribunal "which considers itself to be better situated than any other in order to treat the case," (no. 7). *CM* 4 § 1, c) established the forum "of the place in which in fact most of the declarations or proofs are to be collected." Canon 337 of the *Schema* of 1976 transcribed this last provision, which was modified in 1979 by the Code Commission, giving it the wording of the *CIC*.[34]

The purpose of this forum is, on the one hand, to pursue a "procedural economy": to facilitate the instruction, to avoid the worry of "judicial help" by means of "rogatories" (cf. cc. 1418, 1453), and so forth. The rule also, however, intends to facilitate the *favor veritatis* by means of the proximity between the tribunal that will decide the case and the proofs of

31. Cf. M.J. ARROBA, *Diritto processuale canonico* (Rome 1993), p. 107.
32. Cf. c. 57 §2; SIGNATURA, *Declaratio de foro plerarumque probationum*, no. 1 §3.
33. The delegation decides the nature of this "hearing" (cf. c. 137 §1).
34. Cf. *Comm.* 11 (1979), pp. 257–259.

those which will give rise to its "moral certitude" (cf. c. 1608).[35] Because of all that, it is a title of competence that is very useful and opportune, when it is used *ad normam iuris.*

In 1989, the Apostolic Signatura explained in great detail the different elements that guarantee the usefulness and the justice of this forum.[36] In addition to the elements common to the forum of the domicile of the petitioner already seen (the necessity of each one of these requirements for the valid constitution of the title, the lack of knowledge of the domicile of the respondent, the impossibility of tacit consent, etc.). The Signatura points out the following:

1°) In the territory of the tribunal there must be found "the greater part of the proofs," not "some of the proofs" which will have to be instructed. For that, not only the proofs pointed out by the petitioner must be considered, but also those which it can be presumed that the respondent would present (the private person and the defender of the bond) or what the tribunal would consider useful ex officio (cc. 1452 § 2, 1600, 1680, etc.). Moreover, the "quantitative" criterion is not sufficient (the number of proofs) but one must give attention to the "qualitative" criterion of the proofs, to their 'weight" in order to procure the "moral certitude" about the validity of the marriage.[37] For that, considering that what they are trying to prove is the validity or the nullity of the bond (*matrimonio in fieri*), not the failure of the conjugal life (*matrimonio in facto esse*), they will with great difficulty find these in a diocese in which the marriage was not celebrated and in which the spouses have not been living during the engagement nor in the period immediately following the celebration of the marriage.

2°) By "place" in which the greater part of the proofs are to be found is to be understood the "diocese" (or the territory over which the interdiocesan tribunal is competent), not the "nation."

3°) The answer of the CodCom must be made to the forum of the proofs (given for the forum of the petitioner) about who must give consent when in the diocese of the domicile of the respondent there is no judicial Vicar: the diocesan bishop.

4°) In contrast to the forum of the petitioner, this forum is applicable when the respondent resides in the territory of another bishops' conference. Therefore, so that the judicial Vicar of the respondent can give his consent in a responsible way (c. 127 § 3), he will have to evaluate, ex officio, the difficulties that can arise for a defense (and for the recognition of the truth) as a consequence of which the respondent might not know the

35. Cf. J. OCHOA, "I titoli di competenza," cit., p. 171.
36. Cf. SIGNATURA, "Declaratio de foro plerarumque probationum...," cit.
37. Cf. J. OCHOA, "I titoli di competenza," cit., p. 172.

language of the tribunal "of the proofs,"[38] or that that tribunal is found to be a great distance away, etc.

5°) So that the interrogation of the respondent can be reasonable it is indispensable to know not only that the petitioner wants to introduce the case of nullity of marriage, but for what reason (the "heading" of nullity, the *causa petendi*), what proofs he adduces (cf. cc. 1504, 2°, 1505 § 2, 4°), for example.

Equally so in the forum of the petitioner, the tribunal that receives the petition without the written document (cf. c. 37) in which the consent of the Judicial Vicar of the respondent is included, will be able to ask the said consent ex officio. This request only makes sense when the tribunal has proved that all the other requisites established by the law have been fulfilled. If they were not to present them, it would useless to ask for said consent, since, although it would be obtained, the tribunal would be equally incompetent and would have to reject the petition (c. 1505 §§ 1 and 2, 1°).

6. *One concluding consideration*

Ecclesiastical authority and doctrine affirm the nature *ad validitatem* of the different essential elements of each one of the titles of competence for the causes of nullity of marriage (particularly of 3° and 4° of c. 1673), in a way that, if any of these elements is lacking (persistently limited and defined during the editing of the *CIC* and in its application), there will not exist the respective title and, therefore, the tribunal will be incompetent. At the same time, one recognizes that the said nullity of the title and the incompetence deriving from it does not depend upon the validity of the process and of the sentence, due to the fact that such forums belong to the system of relative competence. Hence, our repeated proposal to include (legislatively) the titles of competence for cases of marriage nullity among those that give rise to absolute incompetence it does not appear to us to be "excessive."[39] One is trying to protect every institution with adequate means to reach the desired purpose and according to the nature of the different areas of power. The "personal sanctions" provided for whoever violates the titles of competence (cf. cc. 1457 § 1 and 1488 § 2) have, in themselves, an administrative nature, not judicial. The judicial defense of systems of legal procedure(above everything that is considered fundamental for good procedural order, which in the Church is directly meant to accomplish the *salus animarum*), cannot stop from involving sanctions about the same institution vitiated by the violation of the law: the

38. Cf. P.R. LAGGES, "Spanish Language Cases and canon 1673,4°," in *The Jurist* 51 (1991), pp. 431–441.

39. Cf. M.J. ARROBA, *Diritto processuale canonico*, cit., pp. 109–110.

process and the sentence, in our case. Moreover, in connection with the negative consideration, which I share, of the decision to include in c. 1488 § 2 the affirmation about the existence of tribunals which judge the case "in a most favorable way,"[40] the principal interventions of ecclesiastical authority about the matrimonial processes (the Council of Trent, the various norms of Benedict XIV, in particular, the Apostolic Constitution *Dei miseratione*, the Instruction of 1929 about the forum of the domicile, the activity of the numerous Roman dicasteries since 1970, etc.) show the "stability" of the abuses in these cases. Despite the above, I consider that it is worthwhile to insist on the convenience of giving an adequate technical answer for the importance of the problem, since, although it is evident that the abuses will always exist, it is necessary to establish boundaries to limit them and to demonstrate their gravity. The study of history shows why the canonical system has not even approached this solution, which the codifiers of 1917, following earlier footsteps, formulated with clarity, although the promulgated text did not recognize it.[41]

40. Cf. P. MONETA, "L'avvocato nel processo matrimoniale," in Z. GROCHOLEWSKI-V. CÁRCEL ORTÍ (Eds.), *"Dilexit iustitiam". Studia in honorem Aurelii Card. Sabattani* (Vatican City 1984), pp. 324–326; M.F. POMPEDDA, *Diritto processuale nel nuovo Codice di Diritto Canonico: revisione o innovazione?* (Rome 1983), p. 19.

41. See the commentaries to the titles "The Competent Forum" and "Matrimonial Processes".

ART. 2
De iure impugnandi matrimonium

ART. 2
The Right to Challenge the Validity of Marriage

1674 **Habiles sunt ad matrimonium impugnandum:**

1° coniuges;

2° promotor iustitiae, cum nullitas iam divulgata est, si matrimonium convalidari nequeat aut non expediat.

The following are capable of impugning the validity of a marriage:

1° the spouses themselves;

2° the promotor of justice, when the nullity of the marriage has already been made public, and the marriage cannot be validated or it is not expedient to do so.

SOURCES: c. 1971; SCHO Resp., 27 ian. 1928 (*AAS* 20 [1928] 75); CI Resp. V, 12 mar. 1929 (*AAS* 21 [1929] 171); CI Resp. VI, 17 feb. 1930 (*AAS* 22 [1930] 196); CI Resp. II, 17 iul. 1933 (*AAS* 25 [1933] 345); *PrM* 35, 38, 39; SCHO Resp., 22 mar. 1939 (*AAS* 31 [1939] 131); SCHO Resp., 15 ian. 1940 (*AAS* 32 [1940] 52); CI Resp. III, 27 iul. 1942 (*AAS* 34 [1942] 241); CI Resp. I, 6 dec. 1943 (*AAS* 36 [1944] 94); CI Resp. III, 3 maii 1945 (*AAS* 37 [1945] 149); CI Resp. III, 4 ian. 1946 (*AAS* 38 [1946] 162); *SN* can. 478; CPAC Rescr., 28 apr. 1970, 8, 9; PC-IDSVC Resp., 8 ian. 1973 (*AAS* 65 [1973] 59)

CROSS REFERENCES: cc. 11, 97, 1059, 1083, 1156–1165, 1400, 1401, 1414, 1432, 1446, 1476, 1478, 1491, 1501, 1505 § 2, 1620, 4°, 1637 § 2, 1671, 1675, 1676, 1737

COMMENTARY

Rafael Rodríguez-Ocaña

This canon is the substitute for the old c. 1971 of *CIC*/1917 and for arts. 35, 37–41 of *PrM*. Under the principle of "*nulla limitatio impugnandi matrimonium*"[1] there is now a legitimate action in the process declaring nullity of marriage. In point of fact it is prescribed that those who possess the active legitimation to impugn a marriage in the first place are the spouses, without any limitation in their exercise of action. Secondly, the promoter of justice, in the case where the nullity has already become public and a convalidation is not possible or expedient.

I. HISTORICAL NOTE ABOUT THE *IUS IMPUGNANDI*

A. Before the *CIC*/1917

It was not always and exclusively the spouses and the promoter of justice who were legitimate actors in the cases of nullity. The long history of the marriage trial provides the following:

— the right of impugning the marriage of the spouses was in some cases (for example, impotence) exclusive to them to the detriment of the *public accusation*, which was obstructed in those situations.[2] However, in contrast, restrictions were also put upon the exercise of *ius accusandi* of the culpable spouse, which was based on the decretal *Propositum* of Alexander III,[3] incorporated into doctrine and the various canonical collections from the twelfth century;

— an accusation ex officio (as it was then called) which dates in a similar way from the decretal *Propositum*[4] and was exercised by the promoter of the inquisition, an office preceding that which today we call the promoter of justice;[5]

1. PCCICR, *Schema canonum de modo procedendi pro tutela iurium seu de processibus* (Typis Polyglottis Vaticanis 1976), p. XIV; cf. *Comm.* 2 (1970), p. 189.
2. Cf. P. GASPARRI, *Tractatus canonicus de matrimonio* (Paris 1904), pp. 401–403.
3. Cf. *X* IV, 7, 1.
4. Cf. *X* IV, 19, 3.
5. Cf. L. DEL AMO, *La defensa del vínculo* (Madrid 1954), pp. 267; 273–274.

— the public accusation,[6] a logical corollary of adopting the criteria of the Roman criminal trial for marriage nullity cases.[7] The accusation of *quivis ex populo* was accepted even in the cases of nullity for defects of consent or lack of form.[8] In other circumstances, like the impediments of consanguinity, affinity or public honesty, an order of preference was established among those who could be legitimated, with a preference for the parents of the presumed spouses before blood relatives, and these before neighbors.[9]

B. CIC/1917 and later legislation

CIC/1917 regulated this matter in c. 1971, insofar as the spouses were considered to possess the capacity to accuse the marriage "nisi ipsi fuerint impedimenti causa," the promoter of justice "in impedimentis natura sua publicis," and all other interested parties could only denounce the nullity to the ordinary or the promoter of justice. In *CIC*/1917, therefore, they kept the limitation of the decretal *Propositum*, maintained for some concrete cases that were called an accusation ex officio, but the public accusation was suppressed, leaving only the possibility of the denunciation to the other subjects.

Moreover, as a result of the application of the cc. 1628 § 3, 1646 and 1654 which deprived an excommunicated spouse from legitimation except in the case of challenging his own personal censure, the *CIC*/1917 added a new limitation to the exercise of the *ius accusandi* for excommunicated spouses, that they be "avoided or tolerated."

Eleven years after the promulgation of *CIC*/1917, the SCHO, by decree of January 28, 1928, considered those non-Catholic spouses to be incapable of seeking the nullity of their marriage, for this they must appeal, in each case, to the SCHO.[10]

The extent of these limitations gave rise to quite a few hermeneutical difficulties, obliging the ecclesiastical authority to intervene frequently and to clarify terms by means of appropriate responses.

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6. Cf. Mª.L. JORDÁN, *Mala fe y acción de nulidad en el matrimonio canónico* (Pamplona 1985), pp. 29–105.
7. Cf. A. ESMEIN, *Le mariage en droit canonique* (Paris 1891), p. 405.
8. Cf. F. ROBERTI, "De iure accusandi matrimonium," in *Apollinaris* 3 (1930), pp. 52–56.
9. Cf. F. SCHZMALGRUEBER, *Ius ecclesiasticum universum* (Rome 1845), pars IV, tit. XVIII, no. 16.
10. Cf. *AAS* 20 (1928), p. 75.

1. *The active legitimation of the spouses*

a) *Evolution in the interpretation of the clause "nisi ipsi fuerint impedimenti causa"*

The CodCom, before *PrM*, gave three authentic interpretations to the clause with reference to the following points:

— what must be understood by an impediment (March 12, 1929);[11]

— whether the culpable spouse could denounce the marriage before the ordinary or the promoter of justice (February 17, 1930);[12]

— whether the spouse who suffered force or fear was capable of the accusation; whether the culpability referred to the nullity or to the impediment; and whether the spouse who placed an honest and licit cause of the impediment was capable (July 17, 1933).[13]

PrM, on August 15, 1936, would gather together the aforesaid interpretations, but this did not keep other interpretations from emerging over the years:

— on July 27, 1942, it was determined that the spouse who was the direct and fraudulent cause of the impediment was not capable;[14]

— on May 3, 1945, the response was given that the culpable spouse could not appeal the sentence;[15]

— and on January 4, 1946, the question as to whether the incapacity to impugn the marriage implied as well the incapability of standing in court was finally resolved.[16]

In the years that followed, the Code Commission went from an approach concerned with outlining the terms of the prohibition to a practice which, in contrast, seeks its mitigation,[17] and this practice influenced their later decisions. In effect, the first decision of the benevolent court (December 2, 1966) came from the SCDF, which, by the decision of June 20, 1970 of the Signatura, provided faculties to the Ordinaries of the first instance so that they might authorize the unqualified spouse to appear in court, to make an extensive aforementioned faculty for the appeal.[18] The same year, in the norms given for the United States of America (*The American Norms*), the limitation on the qualification of the spouses

11. Cf. *AAS* 21 (1929), p. 171.
12. Cf. *AAS* 22 (1930), p. 196.
13. Cf. *AAS* 25 (1933), p. 345.
14. Cf. *AAS* 34 (1942), p. 241.
15. Cf. *AAS* 37 (1945), p. 149.
16. Cf. *AAS* 38 (1946), p. 162.
17. Cf. C. BERNARDINI, "Annotationes ad Pont. Comm. Cod. resp. d. 3 maii 1945 et ian. 1946," in *Apollinaris* 20 (1947), pp. 55–58.
18. Printed in *Periodica* 60 (1971), pp. 323–324.

disappeared completely,[19] these norms were extended to other countries such as Australia, Belgium, England and Scotland.[20] From then on, the mitigation in the application of the clause concerning culpability progressively increased both in the diocesan and apostolic tribunals.[21]

b) *The evolution of the legitimation of the non-Catholic spouse*

The disposition of the SCHO of 1928 was accepted by *PrM* in its art. 35, catalyzing a series of decrees of the SCHO that clarified its extent and content. The questions treated were the following:

— what must be understood by the non-Catholic (February 27, 1937);[22]

— whether the prohibition extends both to the diocesan tribunals and to the Roman Rota and whether the promoter of justice could impugn this type of marriage (March 22, 1939);[23]

— finally, whether apostates from the faith are considered non-Catholics (January 15, 1940).[24]

From 1959 the application of the prohibition began to be mitigated, firstly through several decrees of the SCHO,[25] and afterwards by rotal sentences which depended upon the magisterium of Vatican II to recognize the active legitimation of non-Catholics[26]; and, finally, the *American Norms*, as has already been said, did not place any limitation on the *ius accusandi* on the part of the spouses. But it was the PCIDSVC, on January 8, 1973, in an authentic response to the question of whether the aforesaid norms continued being in force after Vatican II, which definitively repealed those norms supporting the prohibition.[27]

c) *The legitimation of the avoided or tolerated excommunicated spouse*

In contrast to the former restrictions upon the competence of the spouses, the restriction appearing because of excommunication did not present greater problems through the years, and there is the hope that this restriction will disappear as the *CIC* enters into force.

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19. Text ibid. 59 (1970), p. 595.
20. Cf. X. OCHOA, *Leges Ecclesiæ*, IV (Rome 1974), nos. 3895, 3920 and 3943.
21. Cf. M.F. POMPEDDA, "Diritto processuale nel nuovo codice di diritto canonico. Revisione o innovazione?", in *Ephemerides Iuris Canonici* 9 (1983), p. 212.
22. It did not appear in *AAS*; cf. F. ROBERTI, "Quinam acatholici careant iure accusandi matrimonium," in *Apollinaris* 10 (1937), pp. 111–113.
23. Cf. *AAS* 31 (1939), p. 131.
24. Cf. *AAS* 32 (1940), p. 52.
25. Cf. X. OCHOA, *Leges*..., cit., II, no. 2662; III, no. 3382.
26. Cf. c. PALAZZINI, October 24, 1967, in SRRD 59 (1967), pp. 687–691.
27. Cf. *AAS* 65 (1973), p. 59.

2. *The legitimation of the promoter of justice*

The legitimation of the promoter of justice in *CIC*/1917 has as antecedents the decretal *Propositum* and, more directly, the *Regulae* of the Roman Rota of 1909 which ordered the intervention of the promoter of justice in the cases relating to the public good.[28]

The prescription of *CIC*/1917 in c. 1971 § 1, 2° and § 2, however, provoked a remarkable confusion, which persisted even after the articulated legislation brought about through *PrM* 35 and 37–41.

Before the *PrM* there were two authentic responses of the CodCom which had an effect upon this subject:

— the first, already cited, of February 17, 1930, which permits the unqualified spouse to denounce his or her marriage before the ordinary or before the promoter of justice;[29]

— the second, of July 17, 1933, which admits the accusation of the promoter on his own right, without a preceding denunciation.[30]

PrM, recognizing these premises, made a detailed regulation of the different cases that could take place, which in synthesis were the following:

a) *Accusation without a previous denunciation*

It was called *by one's own right*, following the CodCom's interpretation in July 17, 1933, incorporated in *PrM* 35 § 1, 2°. But it could only occur when preceded by impediments "*natura sua publicis*." This clause elicited a noteworthy doctrinal discussion,[31] giving rise to a multiplicity of interpretations about when an impediment was public "*natura sua*," in a word, while the doctrinal side was partial toward a wide interpretation, jurisprudence limited it to a strict concept,[32] notwithstanding those who suggested that, in each case, if the public good called for it, the promoter of justice could accuse the marriage.[33]

b) *The accusation with a previous denunciation*

The same art. 35 § 1,2° of *PrM* added that once the denunciation was brought forward, if the spouse denouncing the marriage happened to be incapable of challenging the marriage, the promoter of justice could do so, no matter what type of impediment, thus leaving intact the prescriptions of *PrM* 38 and 39.

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28. Cf. *AAS* 2 (1910), p. 783.
29. Cf. *AAS* 22 (1930), p. 196.
30. Cf. *AAS* 25 (1933), p. 345.
31. Cf. G. SHEEHY, "Introducing a case of nullity of marriage," in *Dilexit iustitiam* (Vatican City 1984), p. 342.
32. Cf. A. BERNÁRDEZ, *Curso de Derecho Matrimonial Canónico* (Madrid 1981), p. 450.
33. Cf. J. HARING, "De iure matrimonium accusandi," in *Apollinaris* 6 (1933), pp. 243–244.

If the one challenging the marriage was the incapable spouse the following was determined:

— that if he or she had the status of a non-Catholic, the promoter of justice had to seek permission from the SCHO (after the *REU*, permission was asked of the SCDF), except for, in the judgment of the ordinary when the public good demanded it;[34]

— that the spouses' denunciation had to be done before the ordinary or the promoter of justice of the tribunal who was competent to judge the nullity of the marriage.[35]

Moreover, the denunciation brought about by the unqualified spouse had to be subject to the requirements prescribed by arts. 38 and 39 of *PrM*. The lack of any of these requirements was doctrinally evaluated in a different way.[36]

If the denunciation originated from third parties (*PrM* 35 § 2) one had to take into consideration the practice in accordance with *PrM* 41.

II. THE REGULATION OF THE *CIC*

A. The change of system and the principle of the initiative of the party

Within the same chapter, the *CIC*/1917 problematically accepts the *ius accusandi* and the right to ask for the dispensation *super rato*. It does not take into consideration the

nature of the process of nullity, namely, judicial, as opposed to the administrative procedure which the latter represents. Moreover, it does not seem doctrinally correct to designate as a *right* the petition for the dispensation for a marriage ratified but not consummated.[37]

Following the *PrM*, the *CIC* improves these defects in part. Consequently, the subject of the dispensation *super rato* is separated from the *ius impugnandi* and occupies the penultimate chapter (cc. 1692–1706) of the marriage processes. It would have been more efficacious, however, to dedicate a separate title to it, since it cannot be said that these administrative proceedings are, strictly speaking, matrimonial trials, although some

34. Cf. SCSO, Decr. March 22, 1939, in *AAS* 31 (1939), p. 131.
35. Cf. CodCom, Reply December 6, 1943, in *AAS* 36 (1944), p. 94.
36. Cf. F. ROBERTI, "De nullitate sententiae ob defectum habilitatis ad accusandum matrimonium," in *Apollinaris* 12 (1939), pp. 416–417.
37. Cf. G. GARRALDA, "La legitimación en el proceso declarativo de nulidad matrimonial," in *Cuadernos Doctorales* 10 (1992), p. 15.

techniques selected from the contentious trial are employed in their instruction.

The important result is that the *CIC* omits a prescription similar to that of c. 1970 *CIC*/1917 in the norms dedicated to matrimonial processes. This manner of procedure avoids the controversy that such a canon brought about in respect to the difference existing between the accusation and the petition, in order that the tribunal would be able to know and to adjudicate a marriage case. The procedural need which c. 1970 *CIC*/1917 imperfectly accomplishes is now solved more correctly with c. 1501 (see commentary), a new canon which recognizes the absolute validity, in the canonical order, of the principle of the initiative of the party, (which comes from the traditional canonical doctrine: *nemo iudex sine actore*), so that the judge or the tribunal can begin the proper type of trial. The norms concerning special processes have the function of indicating to whom this initiative belongs, because that person is understood to be the bearer of a legitimate interest which must be safeguarded by the juridical system. This should take into consideration, moreover, that the lack of initiative by the party at the initial constitution of the procedural relationship, in accordance with c. 1620, 4°, vitiates the sentence issued by the judge with an irremediable nullity.

B. Change of terminology: "*ius impugnandi*" instead of "*ius accusandi*"

CIC/1917, in the canon parallel to this, made use of the term *ius accusandi* as one of the inherited characteristics coming from the adoption of the Roman criminal procedural system.[38] In the *relatio* published in 1970, which collected the first labors of the *coetus de processibus*, there already appeared the substitution of the term by *ius impugnandi*,[39] which was kept in all the *schemata* and thus appears in the canon.

If we keep in mind the contentious nature of the process declarative of nullity, the change produced appears harmonious. However, we cannot say that the redactors have been totally coherent (some author has spoken of inadvertence),[40] since in c. 1675 § 1 the expression "matrimonium quod ... non fuit accusatum" is kept, without the reasons being known. Anyway, it seems that one must agree with those who upheld the change that it is not totally satisfactory, because the new term used (impugning) could evoke a sense of emnity[41] inappropriate to the canonical processes in general and of marriage in particular. In the corrections to the *Schema*

38. Cf. A. ESMEIN, *Le mariage en droit...*, cit., p. 405.
39. Cf. *Comm.* 2 (1970), p. 189.
40. Cf. M. ZAYAS, "Los procesos especiales en el nuevo Código de Derecho Canónico," in *Curso de Derecho Matrimonial y Procesal Canónico para profesionales del foro*, VI (Salamanca 1984), p. 282.

de processibus of 1976, another distinct expression was suggested, with the alteration of "habiles sunt ad matrimonium impugnandum" to "habiles sunt *ad actionem de validate matrimonii instituendam;*" the suggestion was not accepted because the consultants did not deem it sufficiently well founded for consideration.[42]

It is worth considering the terminological question arising from the fact that the canon does not speak expressly about the spouses *having the right* to challenge, but that they *are qualified* to challenge the marriage, and *CIC*/1917 said the same thing as well.

It is feasible to think that the existence of a right *to* nullity, rather than a right *to petition for* the nullity, is avoided in the current revision of the cannon. The right *to* nullity is the equivalent of demanding from the tribunal a sentence *pro nullitate* in every case as a pastoral solution for one's personal situation, because of the demand of the right of action that one possesses. The right of action would consequently be conceived as a right to a *favorable* sentence concerning the claims that the plaintiff advances, supposing the contradiction that, if the judicial decision does not satisfy the aforesaid claims, the action changes into a right not to have a right.

The right *to ask* for the nullity, on the other hand, is the right to a just sentence independently of its result. It is the right to ask of the ecclesiastical tribunal the juridical protection which declares *erga omnes* what is the canonical *status* of the person, since he or she has a legitimate interest in knowing with certitude what juridical condition he or she holds in the bosom of the church, which moreover in these cases has moral repercussions.

When the *ius impugnandi* is understood in this way, the term *capable* [*habiles sunt*] used by the canon suggests to us that there are persons who are not considered by the canonical ordinance as being juridically capable of asking from the tribunal the protection heretofore described, either by lack of the juridical qualification or because their position in the substantial relationship (for example the position of the children in the case of marriage),[43] does not give rise to an interest juridically protected, or, if such an interest does arise, it is understood to be united to the public interest.[44]

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41. Cf. F. DANEELS,"Il diritto di impugnare il matrimonio (cc. 1674–1675)," in *Il processo matrimoniale canonico* (Vatican City 1988), p. 144.

42. Cf. *Comm.* 11 (1979), p. 259.

43. Cf. L. MADERO, "La tutela procesal del derecho de los hijos a la estabilidad familiar," in *Cuestiones fundamentales sobre matrimonio y familia* (Pamplona 1980), pp. 531–542.

44. Cf. S. BERLINGÒ, "Il processo," in *Diritto matrimoniale canonico* (Milan 1989), p. 229, no. 20.

C. The object of the challenge

The object of the challenge, according to the canon, is the marriage, and, more concretely, the existence of a juridic bond between the presumed spouses effected through their giving of consent. The canon, however, does not say expressly that the marital object of the *ius impugnandi* is the canonical marriage. In this respect, there is room for two considerations:

a) Because of the systematic position that the canon occupies and in accordance with cc. 1059, 1401 and 1671, one can say that the legislator was looking directly at canonical marriage.[45] In fact, the judgment of the Church, in so far as it is an exercise of her judicial power, cf. c. 1400, is exercised about an object that pertains to the competence of the Church;[46] moreover, it claims in the case of the marriage of the baptized the exercise of the *potestas iudicialis* with proper right (c. 1671).

b) However, in an indirect way, the canon seems to be making reference also to the marriage of the non-baptized, given certain conditions, for example, the non-baptized seeks to contract a new marriage, *coram Ecclesia* with a Catholic party, which require the exercise of ecclesiastical jurisdiction. The interrelation of interests in these cases works like a *vis attractiva* toward the competence of the canonical tribunals, from a matter which, in principle, is not submitted to them (cf. cc. 1400 and 1401 in relationship with c. 11). For that it must be added that the ecclesiastical judge can come to know about those marriages only by the previous exercise of the right of action on the part of the one legitimately interested (c. 1501), that is, of the non-baptized spouse. There is, therefore, a substantial two-fold reason that upholds the given interpretation: the objective competence (based on the interest of the Church with a view toward the future marriage before the Church), and the effective submission of the non-baptized in presenting a petition for nullity before the canonical tribunal.

It is also possible to adduce strictly procedural reasons to sustain the competence of the ecclesiastical tribunals to declare the nullity of marriages contracted between non-Catholics or the non-baptized. The main reason is that which c. 1414 favors concerning the connection of cases, in prescribing that the cases connected among themselves must always be judged "in the same process," as long as no legal precept prevents it. Thus, for example, the question about the nullity of a marriage between non-Catholics or non-baptized persons can arise prejudicially in a process that is examining the nullity of a canonical marriage between a Catholic party and a non-Catholic party, challenged on the basis of the impediment of a previous bond of the non-Catholic party, also a non-Catholic or unbaptized.

45. Cf. F. DANEELS, "Il diritto di impugnare...," cit., pp. 143–144.
46. Cf. X. OCHOA, "I processi canonici in generale," in *Apollinaris* 57 (1984), p. 218.

If the validity of the first bond is challenged, being that the plaintiff is the non-Catholic party, such a connection exists, and, in addition, there are other substantial reasons for an ecclesiastical tribunal to resolve the case.

This subject has recently (May 28, 1993) been the object of a decree of the Signatura, in its exercise of the competencies which *PB* 124, 1° and c. 1445 § 3, 1° gave it. In effect, this canon declared that "Ecclesia Ctholica iurisdictione gaudet ad videndum de nullitate, vel minus, matrimonii inter non catholicos contracti, si unus eorum cum parte catholica novum inire matrimonium intendit. In casu, adhibendus est processus iudicialis ad normam cann. 1671–1691."[47]

In 1951, under the prevailing force of the *CIC*/1917, the SCHO also studied and issued norms about how the cases of nullity of marriage of the non-Catholics must be treated.[48] The *vis attractiva* in the hypothesis which the decree had in mind was the intention of converting one of the parties.[49] The decree took into account, moreover, two previous instructions given for similar cases.[50]

D. Legitimate subjects

1. *The spouses: the lifting of the limitations*

The canon does not contain any particular limitation for the active legitimation of the spouses in order to challenge the marriage. As has already been seen, even before the promulgation of the *CIC* some of the restrictive clauses against the right of action had declined. With the enforcement of the *CIC*, the last limitation that held the excommunicated "avoided or tolerated," disappeared.

In reality, during the revision of the old norm, the consultants pled, for reasons of convenience, for the deletion of the expression "nisi ipsi fuerint impedimenti casua," because of the almost impossibly difficult cases that the exclusion of the spouses, who were culpable for the nullity, would cause the tribunals. Other reasons included the impossibility of demanding anyone to remain in concubinage as a punishment for the bad faith in contracting marriage, and, finally, although signs of repentance

47. Signatura, Decreto-Declaración, May 28, 1993, prot. no. 23805/93 V.T. Cf. R. RODRÍGUEZ-OCAÑA, "Notas al decreto-declaración del STSA: la jurisdicción eclesiástica y los matrimonios de los acatólicos," in *Ius Canonicum* 34 (1994), pp. 653–659.

48. Cf. SCSO, *Regulae servandae a Vicariatu Apostolico Sueciae in pertractandis causis super matrimonium acatholicorum* (Typis Polyglottis Vaticanis 1951), p. 20.

49. Cf. ibid., p. 3.

50. Cf. SCSO, "Instr. data ad Vicarium Apostolicum Oceaniae," April 6, 1843, in *Collectanea S. Congregationis de Propaganda Fide*, I (Rome 1907), reimp. of 1971, no. 965; SCSO, "Instr. data ad Episcopum Nesquallien. in Statibus Foederatis Americae Septentrionalis," January 24, 1877, in ibid., II, no. 1465.

could have been demanded, the difficulty was presented of making such repentance juridically evident.[51]

With respect to the prohibition for non-Catholics, the cited *relatio* of 1970, that is to say, three years before the answer of the PCIDSVC of January 8, 1973, in no. 14, held that the nonbeliever could be admitted to act in the case, by an argument *a fortiori* valid for the baptized non-Catholics.[52] Later there came the response of the PCIDSVC, repealing the prohibition. And, finally, the *Schema de processibus* of 1976 would welcome a new canon whose tenor would be the following: "quilibet, sive baptizatus sive non baptizatus, potest in iudicio agree."[53] The precept, without substantial variations, would be transformed into the present c. 1476 in its substitution for c. 1646 *CIC*/1917.

The reform would also affect the excommunicated "to be avoided or tolerated," since there was a special clause ("nisi a sacris canonibus prohibeatur") of c. 1646 *CIC*/1917 in its relationship with cc. 1628 § 3 and 1654 which brought about the need for active capacity. The clause disappeared in c. 1476 and the other canons of *CIC*/1917 applicable to the case were suppressed as well.

Consequently, it can be rigorously maintained that in the present legislation no limitations exist in the exercise of the *ius impugnandi* on the part of the spouses.

However, it does not appear that one can hold with equal rigor that there are no limitations for the non-Catholic who is trying to challenge his or her non-canonical marriage before the ecclesiastical tribunals. The deliberation over the declaration of the Signatura of May 28, 1993, together with the decree and the instructions of the SCHO, quoted at the end of the previous section of this commentary, lead to the conclusion that there will be active capacity in those circumstances always and when there exists a reason,(a new marriage with a Catholic party, the intention of converting, and so forth), which would lead the ecclesiastical jurisdiction to intervene given the interest of the Church in this matter. In the rest of the cases there would have to be a need for the lack of active capacity of the non-Catholic, not strictly because there would be a limitation of the *ius impugnandi*, but rather because of the incompetence of the canonical judge to try in such situations.

2. *Minor spouses*

The situation of spouses who are minors in age (cf. c. 97 § 1), who lack the use of reason and those who are mentally disabled in respect to

51. Cf. *Comm.* 2 (1970), p. 189.
52. Cf. ibid., p. 185.
53. PCCICR, *Schema canonum de modo procedendi pro tutela iurium...*, cit., p. 21.

the legitimate exercise of the *ius impugnandi*, are not, properly speaking, limitations of that right, nor does it appear that they could be considered in need for capacity, but they are better incorporated among those who lack full capacity to take procedural action on their own in the process.

The minimum age to contract marriage validly (c. 1083) is coupled by the legislator with the need to be able to petition and to act personally in spiritual and other matters connected with them (c. 1478 § 3). Therefore, minors who have completed 14 years have the procedural capacity to exercise the *ius impugnandi* without a need for a representative.

Minors who have not arrived at this age, those lacking the use of reason and those who are mentally disabled, on the other hand, can only appear in court "by means of" their parents, guardians or curators. That is to say, the capacity either to petition or to answer personally in the trial is not recognized, and from this follows the necessity that they be represented. But neither the parents, guardians or curators are considered titulars for this action, or substitutes for those represented who are capable, that is to say, in the consideration of the legitimate *pars*, and the proof of this is that the sentence does not affect them but those being represented. The question is whether the petition for nullity is presented in the name of a minor, or a disabled person, etc., and whether it is wanted by them or how we can ascertain that it is wanted.

The legislator contemplates these cases from the perspective of the conflict of rights, or an insufficient guardianship of the rights of the minor, giving as a solution the designation of a new tutor or curator ex officio (c. 1478 § 2). One author has the opinion, on the other hand, that, if the spouse is absolutely incompetent, the *ius impugnandi* can be exercised solely by the promoter of justice, given that the legal representatives of the incompetent person do not possess capacity. Instead, if the spouse is relatively incompetent or this incapacity is doubtful, he will be able to challenge the marriage directly, since c. 1505 § 2,2° must not be applied if the certainty about the incapacity is missing.[54]

It is improbable, however, that the circumstances for the dispensation from the impediment of age[55] could allow that, in those cases, the minor of 14 years can challenge his marriage in opposition to what is mandated by c. 1478 §§ 1 and 4, despite the decision taken by the bishop (c. 1078 has abolished the mp *De Episcoporum muneribus* which reserved this dispensation to the Holy See if it went beyond one year), to proceed to its being granted. One must realize, in addition to the biological maturity of the minor to which c. 1083[56] refers, other personal factors, psychological, powers of discernment, and suchlike.

54. Cf. G. RICCIARDI, "La costituzione del curatore processuale," in *Il processo matrimoniale*..., cit., p. 177.
55. Cf. A.C. JEMOLO, *Il matrimonio nel diritto canonico* (Milan 1941), p. 379.
56. Cf. *Comm.* 9 (1977), p. 360.

Finally, the establishing, on the part of any bishops' conference, for an age higher than that of c. 1083 § 1 as a requirement for liceity for the celebration of marriage does not have the effect of raising the age to 14 completed years, prescribed as the minimum to exercise the *ius impugnandi* for either of the spouses (cf. c. 1478 § 3).

3. *The promoter of justice*

In contrast to the spouses, the promoter of justice, according to the canon, can challenge the marriage only when these two requirements are met: disclosure of the nullity and the impossibility of validating the marriage. Thus, the ambiguities of the previous law have disappeared, just as the redactors of the *CIC* had proposed.[57]

a) *Public knowledge of the nullity*

The formulation of this previous requirement so as to admit the challenge of the promoter of justice had three distinct drafts. In these drafts one can observe a "significant"[58] evolution. Effectively, *a*) the *Schema* of 1976 substituted the old expression "impedimentis natura sua publicis" of *CIC*/1917 and *PrM* for "quando nullitas fundatur in facto de se publico;"[59] *b*) three years later a consultor proposed a new change: "quando factum, in quo nullitas fundatur, publicum evaserit." The proposal was heeded and the redaction adopted after the voting was as follows: "quando nullitas publica evaserit;"[60] *c*) finally, in the *Schema novissimum* there appears what became the definitive version: "cum nullitas iam divulgata sit."[61] The significance of the evolution is that it specifically omits the reference to the publicity of the fact upon which the nullity is based, in order to proceed to the publicity, first of all, and then to the disclosure, afterwards, of the nullity itself, and this because of the required circumstances for the intervention of the promoter of justice: "omnino extraordinarius esse debet, cum scilicet ratio gravis scandali adsit."[62]

Consequently, the promoter of justice can, in his own right, (the institution of the denunciation having also disappeared), challenge the marriage for whatever reason,[63] when the nullity (not the motive behind it) is widely known and it is impossible to convalidate the marriage. The intervention of the promoter of justice must be considered, as we have seen, extraordinary, i.e., there is a reason of grave scandal.

57. Cf. *Comm.* 2 (1970), p. 189.
58. F. DANEELS, "Il diritto di impugnare...," cit., p. 147, note 16.
59. PCCICR, *Schema canonum de modo procedendi pro tutela iurium...*, cit., p. 78, c. 338.
60. Cf. *Comm.* 11 (1979), p. 259.
61. PCCICR, *Schema novissimum*, March 25, 1982 (Vatican City), p. 290, c. 1674, 2.
62. *Comm.* 11 (1979), p. 259.
63. Cf. M.F. POMPEDDA, "Diritto processuale nel nuovo codice...," cit., p. 212.

b) *It is not possible or convenient to convalidate the marriage*

The clause already appeared in the *Schema* of 1976 and would remain until the end. Its reason for being is seen in the coherence with what is ordered in c. 1446, for every class of trials, and its becoming firmly established in c. 1676 for cases of marriage nullity: the judge will always employ the pastoral means at his disposal when there is hope of success, in order to have the spouses convalidate their marriage if it is possible.

Therefore, when convalidation is convenient and possible, the intervention of the promoter of justice, instead of exercising his right to challenge, will have to be that of seeking a convalidation, for which the help of the ecclesiastical judge can be useful, although in this respect the canon imposes nothing. If the petition is presented, and the judge in his fulfillment of c. 1676 sees hopes of success in the relation to the convalidation of the marriage, he will be able to reject *in limine litis* the request of the promoter of justice, because the two requirements demanded for his exercise of the actions for nullity have not been met.

With respect to the terms used by c. 1674, 2°: "convalidation," "impossibility," and "no advisability," the following specifications can be made:

— the convalidation includes the three means (*favorabilia amplianda, odiosa restringenda*), which are regulated by the *CIC*, under that same heading, in chap. X of book IV, part I, tit. VII. That is: the simple convalidation (cc. 1156–1160), the radical retroactive validation (cc. 1161–1165) and the new celebration (cc. 1158 § 1 and 1160).[64]

— the impossibility can be juridical, because the impediment is not able to be dispensed, or is not able to cease, or, in general, because the nullity is not accounted for among those that it is possible to remedy;[65] and in fact, because of the feasible circumstances of the case: for example, the absence of one of the parties, being in an unknown residence;

— the inadvisability, different from the two given above, implies a prudential decision, which supposes an evaluation of the case in which moral implications play an important role: we can imagine, for example, those who have been divorced civilly who have established a new relationship and who are thinking of contracting a new marriage.[66] The problem that can present itself, as has already been pointed out, is when the decision that it is not advisable to revalidate the marriage, if it is made by the promoter of justice, cannot coincide with what the judge adopts when the petition for nullity intervenes.

64. Cf. G. GARRALDA, "La legitimación en el proceso…," cit., p. 46.
65. Cf. J. VERNAY, "Les procès dans le code de droit canonique," in *L'année canonique* 30 (1987), p. 353.
66. Cf. G. GARRALDA, *La legitimación en el proceso…*, cit., p. 46.

c) The refusal of the promoter of justice to challenge the marriage

Finally, there is the question concerning the exercise of the *ius impugnandi* on the part of the promoter of justice once the requirements of the canon are present. In the former norms, given that the incompetent spouses could only denounce the marriage[67] before the refusal of the promoter to bring a petition, the one denouncing could appeal to the ordinary so that, by means of a decree, he would resolve the controversy.[68] In addition, there existed the possibility of appeal to the SCDS in the following cases: *a*) when the promoter of justice will not accuse the marriage because the ordinary did not judge positively about the parties' repentance or of the removal of scandal; *b*) when the ordinary draws up by decree a denial of the accusation if the denunciation had been presented before him; and *c*) when the ordinary resolved negatively on the appeal presented before the refusal of the promoter of justice. The basis for all these appeals was in the fact that the activity of the promoter of justice was of an administrative nature and not a procedural, judicial one.[69]

At present, the function that the promoter of justice fulfills in the process that starts from the time he gets notice of the disclosure of the nullity up to the time when the petition is presented, continues being administrative. But neither do the spouses have limitations on exercising their *ius impugnandi*, nor does the denunciation exist as an institution juridically regulated, although part of the doctrine shows that nothing stands in the way of the denunciation taking place,[70] and it is still possible to appeal to the ordinary and to the *CDWDS*.[71] In any case, the point to emphasize is the damage (see commentary on c. 1737) that the decision of the promoter of justice must effect, is a necessary requirement to be able to appeal to the hierarchical superior.

E. Passive legitimation

The contradictory proposition, an essential characteristic of every type of process, demands that, in addition to having the part of the plaintiff, there also exists the position of the respondent on the other end of the procedural relationship.

Up to now we have turned our attention to one of these parties, namely, the active, and this commentary would be incomplete if the

67. Cf. CodCom, *Reply*, December 6, 1943, in *AAS* 36 (1944), p. 94.
68. Cf. F. ROBERTI, "De obligatione promotoris iustitiae accusandi nullitatem matrimonii," in *Apollinaris* 10 (1937), pp. 113–116.
69. Cf. E. REGATILLO, *Derecho matrimonial eclesiástico* (Santander 1962), p. 380.
70. Cf. J.Mª. IGLESIAS ALTUNA, *Procesos matrimoniales canónicos* (Madrid 1991), p. 139.
71. Cf. A.H. GRUSZYNSKI, "Os personagens no processo canónico de declaraçao de nulidade de matrimonio e seus papéis," in *Direito e Pastoral* 3 (1988–89), p. 251.

passive legitimated party were left untreated. We therefore turn our attention to the respondent.

Although in the *CIC* we do not meet another canon that legitimates the defender of the bond as a public, or institutional, party required in all processes declarative about marriage nullity (cf. c. 1432), c. 1674 indirectly indicates that the spouses who are not filing or suing are considered passive legitimated parties. The reason for this is found in the indivisible nature of the litigated object, the marriage bond. In reality, the decision will affect those directly implicated in the indivisible juridic relationship, without its being possible to render a final binding decision for only one of the subjects. For this reason, once the petition has been filed, the judge will cite the others who are implicated so that they will take the procedural posture adequate for their legitimate interests.

In c. 1637 § 2, the *CIC* handles a similar case when it orders that "if there are several respondents or plaintiffs, and the judgement is challenged by or against only one of them, the challenge is considered to be made by all and against all whenever the thing requested is indivisible or the obligation is a joint one." For, as previously stated, the object (and very nature) of the litigation implies that the sentence will necessarily affect all those bound by the unbreakable unity of the matter or by the solidary obligation. Therefore, the parties proceed to receive capacity through the process of appeal.

In an analogous manner, in marriage cases, the exercise of the *ius impugnandi* by one of the spouses or by the promoter of justice presupposes that the other spouse or both proceed to be legitimated passive members. If the procedural posture adopted by these is joint litigation with the plaintiff, the contradictory remains safeguarded, as has already been pointed out, by the presence of the defender of the bond as the capable passive institutional party.

The procedural method of the *CIC*, however, does not seem the most technically complete, because, beyond these precepts and interpretations, no other norm that regulates it exists (as was done in the exercise of the legal action), whatever passive legitimated non-institutional parties can oppose the exceptions which protect the legitimate interests and rights (c. 1491). The suitability of the express regulation is supported:

a) in its systematic coherence, which requires that, if the *ius impugnandi* of the promoter of justice is regulated within the norms of the matrimonial trial, it is here also that the reference to the defender of the bond as a legitimated passive party appears, unlike now, where that function is contemplated only in c. 1432, in the part dedicated to judgements in general;

b) it is evident that the sentences *pro nullitate* pronounced by the ecclesiastical tribunals affect the personal *status* of the children, who are members of the family being separated by the judicial decision. Without

their legitimate interest the basis for the capacity of the modern procedure), in *maintaining family stability*, their capacity would have received a judicial protection in the canonical system in proportion to the damages produced. The recognition in these points of the passive capacity, which gives the option to sustain, in joint with the defender of the bond before the plaintiff spouse, the validity of the matrimony, signify an important step in the effective vigilence of the *ius defensionis* in the canonical law system.

1675 **§ 1. Matrimonium quod, utroque coniuge vivente, non fuit accusatum, post mortem alterutrius vel utriusque coniugis accusari non potest, nisi quaestio de validitate sit praeiudicialis ad aliam solvendam controversiam sive in foro canonico sive in foro civili.**

§ 2. Si autem coniux moriatur pendente causa, servetur can. 1518.

§ 1. A marriage which was not challenged while both spouses were alive, cannot be challenged after the death of either or both of the spouses, unless the question of validity is prejudicial to the resolution of another controversy in either the canonical or the civil forum.

§ 2. If a spouse should die during the course of a case, can. 1518 is to be observed.

SOURCES: c. 1972; *PrM* 42, 222; *SN* can. 479

CROSS REFERENCES: cc. 18, 1143–1149, 1430, 1432, 1482, 1484, 1486, 1492, 1505, 1518, 1540, 1599–1601, 1619–1627, 1644, 1674, 1686–1688, 1697–1706, 1707

COMMENTARY

Rafael Rodríguez-Ocaña

I. PRELIMINARIES

1. *Introduction*

Canon 1675 considers two hypotheses which have already been regulated in the *CIC*/1917 (cc. 1972 and 1733) and which refer, in the first place, to the challenge of a marriage once one or both of the spouses has died; and, in the second place, to the prosecution of the process of marriage nullity when one of the spouses has died during the process. The differences with *CIC*/1917,[1] insofar as the regulation of these hypotheses are concerned, are limited almost exclusively to the challenge of the marriage after the death of one or both spouses.

1. Cf. G.M. USAI, "L'impugnazione del matrimonio dopo la morte di uno od entrambi i coniugi (can. 1675)," in *Quaderni Studio Rotale* 3 (1989), p. 47.

As a matter of fact, c. 1972 *CIC*/1917 presumed that the marriage that was not accused during the life of the spouses was valid and admitted a challenge if it were to rise incidentally. With respect to the prosecution of the case, however, if one of the parties has died, the differences are minor, although they are important from a technical point of view. This is confirmed by the comparison of c. 1675 § 2 and c. 1733 *CIC*/1917, which is very much like the present c. 1518, applicable, until 1936, to the cases of marriage nullity.[2]

PrM kept that which was mandated by c. 1972 (cf. *PrM* 42) but introduced substantial changes in the procedure to be followed in the *post mortem* prosecution of the process (cf. *PrM* 222). Canon 1733 *CIC*/1917 effectively ceased being applied as the Rotal jurisprudence had done, and became a way of proceeding whose elementary principles are as follows: if the cause was pending, and one of the spouses died, the acts were filed, unless for serious reasons (for example, the legitimation of the children) the other spouse or the heir would insist on proceeding to judgment.

2. *Systematic and terminological issues*

a) *The organization of the CIC*

Insofar as the good choice of the organization adopted by the *CIC* in respect to the *ius impugnandi*, see commentary on c. 1674. The considerations made there can be extended to c. 1675 § 1 if we compare it with c. 1972 *CIC*/1917.

PrM systematically improved the position of c. 1972 in introducing it as the last article of the title: "The right to accuse the marriage." However, the same thing did not take place with the new norm of art. 222 § 2, which mandated the procedure to follow in the prosecution *post mortem* of matrimonial cases, located in the title dedicated by *PrM* to the juridical remedies against the sentence, and more specifically, in ch. II concerning the appeal. It seems that the justification for such a strange position of art. 222 § 1 is found in § 2 of the same article, which refers to the appeal of the defender of the bond when one of the spouses has died. Both these paragraphs, in fact, contain important points, and it would have been more correct had each of them been in the appropriate place: § 1 in the title to the right to accuse the marriage; and § 2 in the heading about the appeal.

In the *CIC*, on the other hand, the problem is simplified because the norm of art. 222 § 2 disappears, and logically proceeds to join in the same canon the two possibilities that can occur: a challenge of the marriage

2. Cf. c. JULLIEN, January 11, 1933, in SRRD 25 (1933), p. 4, no. 5.

once one or both spouses has died, and the continuation of the matrimonial process after the demise of one or both spouses.

b) *Accusation or challenge of the marriage?*

While in *CIC*/1917 and the later legislation there was talk of the *ius accusandi*, in c. 1674 (see commentary) the expression is changed into *ius impugnandi*. In spite of the technical advance that has implied the new designation, the doctrine still kept some reservations with respect to the new term, reservations which were explicitly stated in the possible meanings which this suggests,[3] at times hardly in agreement with forensic marriage activity.

To the above it must be added that, with little success, c. 1675 § 1 ("matrimonium quod ... non fuit *accusatum*;" "post mortem alterutrius vel... *accusari non potest*") twice employed the terms that were derived from the former expression *ius accusandi*, which was omitted in c. 1674.

The different translations into vernacular languages of c. 1675 § 1 reflect the position that each language has adopted with respect to a lack of precision in the canon. Thus we see translations, like the official Spanish translation, which uses the term *acusado*[4] for the first expression, and *impugnado* in the second; the Italian translations, which use, for both expressions, either *acusado* or *impugnado*, are more coherent.[5]

In order to arrive at some conclusions to this question, it is suitable to note that the terms "accused," "to accuse," and suchlike, are technically more proper for the area of penal procedure, and they should be reserved for this, instead of continuing to be employed in the cases concerning the status of persons, whether it is used in marriages, as we just saw, or whether it is used in the nullity of sacred ordination (cf. c. 1708). In every case, if we realize the repeated jurisprudence which affirms that, in the petition for nullity once one of the spouses has died, there is no request made that the bond be declared dissolved, (such a juridical effect has already happened with the death of one of the spouses), and if the fact of the nullity of the bond had been clearly understood from the day in which the marriage was celebrated,[6] then it is does not seem that the plaintiff of this petition is challenging, much less accusing, the marriage.

3. Cf. F. DANEELS, "Il diritto di impugnare il matrimonio (cc. 1674–1675)," in *Il processo matrimoniale canonico* (Vatican City 1988), p. 144.

4. Cf. *Commento al Codice di Diritto Canonico* (Rome 1985).

5. Cf. L. CHIAPPETTA, *Il Codice di Diritto Canonico. Commento giuridico pastorale*, II (Naples 1988).

6. Cf. c. JULLIEN, January 11, 1933, cit., p. 2, no. 2; sentence of the Signatura, October 16, 1982, in «Periodica» 72 (1983), p. 117.

II. POSTHUMOUS CHALLENGING OF THE MARRIAGE

In this section we are going to concentrate our attention on the first of the cases which c. 1675 lays out in § 1. We shall strive to give an outline of the problem that was presented in the former regulation, in order to later study what is mandated by the *CIC*.

1. *The difficulties of interpretation in CIC*/1917

Contrary to c. 1971, c. 1972 was not the object of authentic interpretations on the part of the CodCom, but it did not for this reason cease to present difficulties both of interpretation and of its specific application, as the jurisprudence highlighted.[7] There were two relevant issues discussed: the first referred to the presumption of the validity of the marriage, stipulated by the canon when that marriage had not been challenged during the life of the spouses. The second issue related to the exception to that principle, that is, the possibility of challenging the marriage *post mortem* of the spouse or the spouses if the question were to arise incidentally.

a) *The challenge of the marriage when the spouses are dead*

The canonical doctrine held different points of view on this matter that we shall take up in the following points:

— on the grounds of historical law, it was maintained that the expression "that no denunciation was made while the spouses were alive" (cf. c. 1972) must be understood "dummodo accusation durante utriusque coniugis vita fuerit *possibilis;*"[8]

— the general principle of c. 1972 was understood to mean the impossibility of the direct exercise of the *ius accusandi* after the death of the spouses, because the marriage was *presumed* to be valid;[9]

— insofar as the nature of the presumption is concerned, the doctrine is divided into various possibilities: some were inclined to qualify it as a presumption *iuris et de iure*, because no direct proof to the contrary was admitted;[10] others sustained that there is a presumption *iuris tantum* because proof is admitted to the contrary in incidental cases;[11] a third interpretation held that there was an absolute presumption, (one that does not admit proof to the contrary), which, however, was limited, insofar as it

7. Cf. sentence of the Signatura, July 3, 1971, in *Periodica* 61 (1972), p. 144.
8. D.G. OESTERLE, "Notae historicae ad can. 1972," in *Il Diritto Ecclesiastico* 55–56 (1944–45), p. 9.
9. Cf. R. COLANTONIO, "L'accusa matrimoniale postuma," in *Studi di diritto canonico in onore de Marcello Magliocchetti*, I (Rome 1974), p. 311.
10. Cf. F.X. WERNZ-P. VIDAL, *Ius canonicum*, V (Rome 1928), p. 835.
11. Cf. S. VITALE, *De iure accusandi matrimonium* (Rome 1937), pp. 47–48.

included the route of incidental cases;[12] and, finally, more recently, there was talk about a presumption *iuris tantum* near in meaning to the *iuris et de iure.*[13]

b) *The incidental matter*

The exception to the general principle of impossibility of the exercise of the *ius accusandi* had the proviso that the stated accusation would be presented by way of an incidental case. Doctrine and jurisprudence maintained that this stated possibility was not contrary to the law, since, as we have pointed out above, the accusation did not have as its purpose the declaration and the effective dissolution of the apparent bond, since this had disappeared with the death of the spouse. It was understood, on the contrary, that it concerned a matter of fact: the declaration of the nullity of the bond at the moment of the celebration.[14]

The juridical basis was found in the non-prescriptive actions dealing with the status of persons (cf. c. 1710), and in the non-existence of a norm which would mandate the expiration of the legal action, once one of the spouses has died, in a manner analogous to what was prescribed in c. 1702, namely, that, with the death of the defendant, the penal action expired.

The differences appeared when doctrine and jurisprudence attempted to specify what reasons would permit the incidental case and whether this might arise in the civil forum or only in the canonical. The positions were different. Thus doctrine demanded (a bit rigorously?), the existence of a limited just cause, thus copying the precept of *PrM* 222 § 1 to these questions, to admit incidentally the accusation of the marriage.[15] Other authors and also jurisprudence, more in consonance with the *iter* of c. 1972, were inclined, however, toward a concept more open to a just cause, according to which it would have been sufficient, for example, that usefulness would follow or some harm would be avoided.[16]

There were also encountered positions with respect to whether the incidental matter might arise from a principal case heard in the civil courts. Jurisprudence, relying upon the concept of the incidental case as treated in *CIC*/1917, upheld that this concept demands a connection and subordination to the principal case, which assumed an identity of jurisdiction and competence, and therefore, it could arise only in an ecclesiastical

12. Cf. R. SANTORO, *L'impugnazione del matrimonio dopo la morte dei coniugi* (Rome 1943), p. 126.
13. Cf. C. DE DIEGO-LORA, "La tutela jurídico formal del vínculo sagrado del matrimonio," in *Ius Canonicum* 17 (1977), p. 54.
14. Cf. c. JULLIEN, January 11, 1933, cit., p. 2, no. 2; sentence of the Signatura, October 16, 1982, cit., p. 117, no. 6.
15. Cf. R. COLANTONIO, "L'accusa matrimoniale postuma," cit., pp. 321–322.
16. Cf. F.M. CAPPELLO, *Tractatus canonicus–moralis de sacramentis*, V (Rome 1950), p. 888; c. PRIOR, June 20, 1922, in SRRD 14 (1922), p. 191, no. 1.

forum.[17] Others maintained the opposite position that, depending on the principal case in the secular forum, the incidental case would be decided in the canonical forum, and this was supported by one canonist and also by a sentence from Signatura.[18]

c) *Legitimate subjects*

In order to finalize the review of the issues laid out in the previous law, all that remains is to indicate who were the legitimate subjects to accuse the marriage when one or two of the spouses had died.

Since c. 1972 could be understood in the light of c. 1971 § 1, it appeared as though drawing up the competency of the surviving spouse and of the promoter of justice would suffice. However, the jurisprudence both of the SRR[19] and of the Signatura[20] understood that c. 1972 neither enumerated nor limited the persons capable of accusing the marriage. That is why all of those who were pursuing a legitimate interest can also be capable.

2. *Present-day norms*

a) *The reform of the previous law*

The first position of the consultants in regardappeared to the posthumous challenge of marriage appears in the *Schema de processibus* of 1976. In fact, the canon that covered the posthumous challenge already differed importantly from c. 1972 *CIC*/1917. In spite of maintaining the presumption of the validity of the marriage, it changed the expression "nisi incidenter oriatur quaestio" to "nisi quaestio de validitate praeiudicialis habeatur ad aliam connexam solvendam controversiam.[21] Thus the prejudicial status trumped the incidental status, ending (however tentatively) the controversy about the question of the incidental status.

The second step was taken with the amendments to the *Schema*, namely in those amendments which tried to transform the presumption of validity into a prohibition against taking legal action. There was also a request that they add, given that those cases were pending with greater frequency in the civil court, a clause that would recognize the duality of the forums: canonical and civil.[22] In the *Schema* of 1980 the corrected text of the canon appeared, which is identical to the present c. 1675 § 1. In it we

17. Cf. c. HEARD, June 20, 1936, in SRRD 28 (1936), p. 401, no. 13; sentence of the Signatura, July 3, 1971, cit., p. 161.
18. Cf. sentence of the Signatura, October 16, 1982, cit., pp. 119–121, no. 8.
19. Cf. R. COLANTONIO, "L'accusa matrimoniale postuma," cit., pp. 325–326.
20. Cf. sentence of the Signatura, July 3, 1971, cit., p. 157.
21. PCCICR, *Schema canonum de modo procedendi pro tutela iurium seu de processibus* (Typis Polyglottis Vaticanis 1976), p. 78, c. 339.
22. Cf. *Comm.* 11 (1979), pp. 259–260.

find a general principle that prohibits challenging the marriage *post mortem,* and the exception to this principle. Both themes are the subject of the upcoming sections.

b) *The prohibition against challenging the marriage "post mortem"*

The general principle established by the legislator in the *CIC* specifies that, when one or both spouses have died, if the marriage was not challenged during their lifetime, the challenge is prohibited. This formulation put an end to doctrinal discussions concerning the ancient presumption of validity of those marriages.

The prohibition against challenge, in fact, means that the canonical system does not grant juridical legitimacy to any type of interests (whether public or private) that impugn a marriage unchallenged during the lifetime of the spouses, unless the question of validity is prejudicial. From the procedural point of view, the prohibition means that it does not recognize the capacity of any person proposing before the ecclesiastical judge a petition for a posthumous nullity. If such a petition were to be admitted, it would on the basis of c. 1620,5° result in a null sentence, given that there is a lack of legitimation: "non habet personam standi in iudicio."

According to this interpretation, c. 1675 § 1 does not presume a derogation of c. 1492, according to which actions bearing on personal status are never extinguished by prescription. In our opinion, the point of view that the legislator adopts is different from prescription, since it takes into consideration the fact that death dissolves the previously existing marriage bond. Further, it prohibits such actions with justification, and in consideration of the protection of the effects which that bond procured in the life of the spouses, the same *favor matrimonii,* the legitimation of the children, etc.[23] For these reasons, c. 1675 § 1 must rather be connected to the canon immediately preceding, c. 1674, for in this canon the legislator empowers both the spouses and the promoter of justice to challenge the marriage; in c. 1675 § 1, on the contrary, nobody is made competent unless the case is prejudicial. Consequently, there is a denial of capacity *ad processum,* but not a norm that extinguishes the *ius impugnandi* by prescription, that norm neither has existed[24] nor presently exists in the *CIC.*

The *CIC* requires two conditions to make the prohibition effective: the death of one of the spouses and the fact that the marriage had never been challenged during their lives. It is fitting to point out that:

— the tenor of the norm seems to require that the two conditions both be present;

23. For the motives which led the legislator to prohibit the challenge, cf. G. GARRALDA, "La legitimación en el proceso declarativo de nulidad matrimonial," in *Cuadernos Doctorales* 10 (1992), p. 51.
24. Cf. c. JULLIEN, January 11, 1933, cit., p. 2, no. 2.

— the canon does not clarify whether "the death of the spouse" connotes the physical or the "presumed death," which emerges from the process declaring the presumed death of the spouse (cf. c. 1707). If the presumed death is admitted (which seems reasonable in so far as this declaration permits the surviving spouse to enter another marriage), the fact of the prohibition would be based then on a presumption, not about the validity of the marriage, but about the death of the spouse. Given that this type of presumption is not absolute, it would admit the possibility of proof to the contrary. The relationship between c. 1675 § 1 and c. 1707 seems to further demand that the death of the spouse be evident in an authentic document,[25] ecclesiastical or civil. It is not mandated, therefore, that it be public (cf. c. 1540).

— For the correct interpretation of the clause which requires that the marriage would not have been challenged during the life of both spouses, it is advisable to keep in mind that we are dealing with a canon which, like c. 1972 *CIC*/1917, "coarctat liberum iuris exercitium et subest strictae interpretationi" (cf. c. 18).[26] All of this implies that the term "challenge" must be understood in a broad sense. In the historical law, we met cases in which a challenge was admitted for those who could not challenge the marriage in the "useful" time,[27] giving rise to a certain author interpreting the clause "it had not been challenged" in the sense that the challenge had not been possible during the lifetime of the spouses.

c) *The prejudicial exception*

The prohibition against challenging the marriage, when one or both spouses have died, collapses when the matter concerning nullity presents itself as prejudicial in resolving another controversy, independentof the forum in which this is being examined.

This prejudicial status means that it is necessary to decide, first of all, on the nullity of the marriage, because the decision that must be given to the other matter that has been brought up in the civil or in the canonical court depends on it. Doctrine has spoken about a greater equity in this way of regulating the exception than that effected by *CIC*/1917.[28] At the same time, however, it has been revealed that, although it closes the problem presented with the previous norm, it opens up a new one that is made specific as to how it makes the prescription of the canon viable when one seeks the declaration of nullity before the civil judge. The reason is that it does not seem felicitous for it to be sent to the ecclesiastical tribunal for its substantiation. There can also, however, exist reservations in the

25. Article 222 §1 of *PrM*, for the prosecution of the case, also demanded that the death of the spouse be recorded in an official document.
26. c. JULLIEN, January 11, 1933, cit., p. 4, no. 5.
27. Cf. *X* IV, 18, 6: D.G. OESTERLE, "Notae historicae...," cit., p. 10.
28. Cf. J.Mª. PIÑERO, *La ley de la Iglesia*, II (Madrid 1986), p. 479.

secular jurisdiction that impede the civil treatment of the ecclesiastical decision declaring of the fact of nullity.[29]

Canon 1675 § 1 does not clarify what the nature of the principal question must be to allow the appeal of a previous decision regarding the nullity of the marriage. Such a controversy could be judicial or administrative. Within the scope of the judicial, the concern would be whether it is contentious or penal. Neither does the canon specify whether the object that the controversy treats is indifferent whenever there exists a prejudicial connection with the marriage nullity. Both issues have already had partial responses in doctrine.

Thus, in respect to the first, it has been maintained that the declaration of nullity can be prejudicial both regarding an administrative controversy and a judicial controversy.[30] Within these latter controversies, the contentious, the contentious-administrative and the penal types can be admitted.

The second issue, concerning what must be the object of the controversy, provokes different commentaries which emphasize the danger of adapting certain effects of the use of the faculty granted by the canon. As a matter of fact, doctrine reveals that there exists more than a remote possibility regarding interests that are sought which are not related to the status of the family born of the marriage. Therefore, the interests involved are neither spiritual nor related to them.[31] However, it must be recorded that certain ends (the good name, the legitimation of the offspring, etc.) have been considered, and there are good examples in the history of canon law,[32] worthy of protection by the canonical system. At this point, the action of the judge is presented as decisive in order to ascertain the legitimacy of the interests that are motivating the parties. It will be in the presentation of the petition that the judge must evaluate whether there exists a legitimate interest and whether there exists the *fumus boni iuris* before the libellus is accepted (cf. c. 1505).[33]

d) *The capacity*

The problem necessarily concerns the ones capable in this type of posthumous case, since the purpose of the ecclesiastical decision is not the dissolution of the bond. The canon says nothing in this respect, and neither did the old c. 1972, but jurisprudence, referring to c. 1972 *CIC/*1917, had already indicated that the capacity was neither reserved to the children nor to the heirs, but rather that it extended to all those who had a

29. Cf. M.F. POMPEDDA, "Diritto processuale nel nuovo Codice di Diritto Canonico. Revisione o innovazione?," in *Ephemerides Iuris Canonici* 39 (1983), p. 213.
30. Cf. F. DANEELS, "Il diritto di impugnare il matrimonio...," cit., p. 149.
31. Cf. J.Mª. IGLESIAS ALTUNA, *Procesos matrimoniales canónicos* (Madrid 1991), p. 139, note 86.
32. Cf. D.G. OESTERLE, *Notae historicae...*, cit., *passim.*
33. Cf. C. DE DIEGO-LORA, commentary on c. 1505, in *CIC Pamplona*, p. 906.

legitimate interest.[34] This is the criterion held by most of the doctrine and is assumed in c. 1675 § 1, and they play a part in the trials of challenge *post obitum* of the marriage regarding those matters which might be in the principal controversy.[35] Three details are salient:

— in these trials we may encounter a situation of a necessary joint litigation.[36] That is to say, the judge must necessarily call the surviving spouse so that that person may adopt the procedural posture that he or she believes is more suitable for his interests;

— in respect to the action of the promoter of justice, the Signatura was inclined toward his non-intervention,[37] due to the lack of the basic presupposition, the defense of the public ecclesiastical good (cf. c. 1430), which sustains it, and having considered that the interest which this type of process moves is exclusively private;[38]

— on the contrary, it seems that the presence of the defender of the bond would be necessary, because c. 1432 imposes this presence for the cases "in quibus agitur ... de nullitate vel solutione matrimonii." Actually, c. 1432, unlike 1430, determines the presence of the defender of the bond not only according to the type of interest, but according to the type of cases.

III. THE PROSECUTION OF THE *POST MORTEM* CASE OF THE SPOUSE

1. *In the Instruction "Provida Mater"*

CIC/1917, up until 1936, treated the issue quite similar to the current *CIC*, the only difference being the inclusion of the capable interested party in the first of the two assumptions contemplated in c. 1733 of *CIC*/1917.

PrM introduced, however, a new regulation in art. 222 § 1: if, while the case is pending, the death of one of the spouses is verified by an authentic document, the principle acts were put into the archives and the court did not proceed to a decision, unless the surviving spouse or the heirs insisted on continuing the case for serious reasons.

34. Cf. sentence of the Signatura, July 3, 1971, cit., p. 157.
35. Cf., among others, F. DANEELS, "Il diritto di impugnare il matrimonio…," cit., pp. 149–150.
36. Cf. M. MORENO HERNÁNDEZ, *Derecho Procesal Canónico*, I (Barcelona 1975), pp. 143–145.
37. Cf. sentence of the Signatura, July 3, 1971, cit., pp. 147–151.
38. Cf. G.M. USAI, "L'impugnazione del matrimonio dopo la morte…," cit., p. 48.

PrM, therefore, established as a general principle the cessation of the trial (not that of the legal action of nullity, for which there is no prescription), based on the fact of the death of the spouse. But the expiration did not take on an immediate form, but appeared in a conditioned manner at the initiative of the surviving spouse or the heir of the deceased.[39]

We can limit the issues that favored distinct positions in respect to the aforesaid art. 222 § 1 to two: the extent given to the term "heir" and the serious reasons that authorized the prosecution of the case.

With respect to the first topic, the discussion was established in the following terms: whether heir is understood to be one who receives the inherited goods by universal title or from an aliquot part, (this was the technical and restrictive sense of the term), or if the legatees or any other person who would have the title of heir to the goods *de cuius* was also understood, the broad meaning of the term.[40] Both doctrine and jurisprudence were inclined to this last interpretation, in favor of which they presented many reasons.[41]

The second issue centered upon the grave reasons demanded by art. 222 § 1. In contrast to any sentence that is affected because the prosecution would only be possible when it was exercised in favor of the offspring,[42] the enumeration of the serious causes which, by way of example art. 222 presented, gave rise to the fact that the general tone of doctrine and of jurisprudence suggested that there could be various grave reasons and that the enumeration contemplated by *PrM* was only an indicative list and not an exhaustive one.[43] Of course, it demanded that such reasons had to have a connection with the nullity because of which its declaration would have been necessary in order to give them satisfaction.[44]

2. *In the reform of the code*

The 1976 *Schema* c. 339 § 2 (now c. 1674 § 2, contained a view of doctrine and jurisprudence about the prosecution of the case of nullity in the following text: "Si autem coniux moriatur pendente causa, servetur can. 159 et 291."[45]

39. Cf. C. DE DIEGO-LORA, "La tutela jurídico formal…," cit., pp. 54–55.
40. Cf. R. COLANTONIO, "L'accusa matrimoniale…," cit., p. 317.
41. A summary of said reasons is given by J.Mª. SERRANO, *Nulidad de matrimonio coram Serrano* (Salamanca 1981), pp. 312–320.
42. Cf. c. HEARD, July 20, 1936, cit., p. 401, no. 13.
43. Cf. R. COLANTONIO, "L'accusa matrimoniale…," cit., p. 316.
44. Cf. M. MARTÍNEZ CAVERO, "El fiscal en la acusación del matrimonio," in *Revista Española de Derecho Canónico* 27 (1970), p. 509.
45. PCCICR, *Schema canonum de modo procedendi…*, cit., p. 78.

Canon 159 (the present c. 1518) corresponded to 1733 of the *CIC*/1917, and contained something new with respect to this latter canon, explained in the *praenotanda* of the *Schema*: "non solum heres defuncti aut successor, sed *etiam interesse habens potest prosequi causam* nondum conclusam et *suspensam ob mortem littigantis.*"[46] Canon 291 was the equivalent to 1885 of *CIC*/1917.

In the amendments to c. 339 § 2, its suppression was requested because it was considered superfluous, but the proposal did not have success. On the contrary, the proposal to omit the reference to c. 291 of the *Schema* was indeed accepted.[47] The formulation of c. 159 was also changed, when the consultors substituted the expression "aut interesse habens litem prosequatur" for that of "aut is cuius intersit litem resumat."[48] Both canons, 339 § 2 and 159, without any more reportable changes, were converted into the present cc. 1675 § 2 and 1518.

3. *Prosecution of the case "post mortem" in the norms of the CIC*

As we have examined above, the *CIC* had turned to regulate the issue in a form resembling the way *CIC*/1917 had done it before *PrM* came to be in force. While the cause for nullity was pending, states c. 1675 § 2, if the spouse dies, the precept in c. 1518 must be observed. There are two possibilities which c. 1518 establishes relative to the status of the case depending on whether the case had been concluded or not.

a) *Common issues for the two cases*

It seems necessary, before we refer to each one of them separately, to consider together some points of interpretation that are applied to the two cases contemplated by c. 1518 in connection with c. 1675 § 2.

In the first place, it is fitting to point out the reasons that make possible the prosecution of the case even after the death of the spouse. Procedural doctrine teaches that the prosecution is possible as long as the death of the litigant does not presuppose the extinction of the litigious object, which led an author to point out that, once the spouse is dead, it is not possible to continue with a case of separation.[49] Also it was held that the arguments in favor of the posthumous challenge of the marriage equally confirm the possibility of admitting the prosecution juridically for the following reasons: the actions, once introduced into the trial, do not fall to prescription nor are they extinguished with death; nor does it prejudge the case of nullity through the fact of the prosecution.[50] Finally, it proves in

46. Ibid., p. VIII; *Comm.* 8 (1976), p. 188.
47. Cf. *Comm.* 11 (1979), p. 243; 12 (1980), p. 188.
48. Cf. ibid., p. 95.
49. Cf. Cf. J.J. GARCÍA FAÍLDE, *Nuevo Derecho procesal canónico* (Salamanca 1984), p. 91.
50. Cf. J. M. SERRANO, *Nulidad de matrimonio...*, cit., pp. 311–312.

this way to be a better safeguard for the claims both of the spouse and of third parties,[51] without the *favor matrimonii* being compromised, since it must be present during the prosecution.

Canon 1518 applies to the cases of marriage nullity in any instance or grade in which they are found, and there is no indication to the contrary: c. 1675 § 2 uses the expression "pendente causa." It also covers the documentary process (cc. 1686–1688), the new proposition of the case (c. 1644), and the complaint of nullity against the sentence (c. 1619–1627). In § 2 of c. 1675 is found the requirement that "the case be pending," that at least the petition has been introduced. Here one must realize that the norm speaks of the "cause" (c. 1675 § 2), while in that of the report (c. 1518) the term "instance" is used and, in accordance with c. 1517, this begins with the summons. However, for matrimonial cases, the criterion of c. 1675 § 2, which is provided specifically for them, will be followed.

With respect to the "death of the litigant," in the law of the *PrM* it was maintained that it had to be interpreted in the broad sense. Therefore, all those cases involving dissolution of the bond were made equivalent to it, among those which are enumerated: the pontifical dispensation, the pauline privilege or solemn religious profession.[52] At present, given the reference to c. 1518 and the fact that this puts death in the same category with the change of status and the cessation in office, (all of them situations which have in common the verification of the fact that the juridical interest, which was the foundation for the condition of the legitimate party in the contradictory defense, has been lost) it can be sustained that when this takes place, in the progress of the case, any juridical variation in the condition of the spouse which implies that result, one will apply the rules found in c. 1518. Examples are: death, the declaration of the presumed death (c. 1707), dispensation *super rato* (cc. 1697–1706),[53] the petrine privilege (c. 1148), or the pauline privilege (cc. 1143–1147, 1149).

Although c. 1675 § 2 refers only to the death of a spouse and c. 1518 similarly contemplates the death of only one litigant, it does not appear that there would be any difficulty in acknowledging that the reference to c. 1518 is possible even when the two spouses have died.[54]

Another detail must be noted in reference to art. 222 § 1 of *PrM*, which mandates the notification of the death by an authentic document. Now it is not a precept, but there is no doubt that the tribunal will have to

51. Cf. C. TRICERRI, commentary on c. 1675, in *Commento al Codice di diritto canonico* (Rome 1985), p. 956.
52. Cf. M. MARTÍNEZ CAVERO, "El fiscal en la acusación...," cit., pp. 507–508.
53. Consulted by the Signatura, the Sec indicated, in 1983, that papal authorization is not necessary to request the nullity of the marriage or to continue the case after obtaining the dispensation *super rato*. The text of this indication can be found in B. MARCHETTA, *Il processo «super matrimonio rato et non consummato,»* in *Dilexit iustitiam* (Vatican City 1984), p. 429, note 30.
54. Cf. J.J. GARCÍA FAÍLDE, *Nuevo Derecho procesal...*, cit., p. 34.

have a record of the death through whatever sort of means, proof or indications that convince the tribunal of the death of the spouse.

Finally, it is worthwhile to point this out in relation to the conclusion of the case as the point of division of the two conditions of c. 1518: the norm refers to the "decree of the conclusion of the case" (c. 1599 § 3) given by the judge or the tribunal when the parties have nothing to add, once everything that is indicated in the presentation of the proofs is completed or the useful time period has lapsed, or the tribunal has sufficiently instructed the case (c. 1599 § 2).

b) *If the case has not been concluded*

In this case, when the decree of the conclusion of the case has not yet been given, c. 1518 provides that the instance is suspended until the heir of the deceased or his successor or a person legitimately interested resumes the case.

We are now considering a case where the contradictory arguments are postponed through the death of one of the spouses. Here the suspension proceeds from a juridical fact considered apart from the actual scope of the case, namely, the death of the spouse (or spouses). This death has an influence upon the advancement of the case; such a phenomenon receives the technical name of *interruption*,[55] and belongs to the so-called temporal crises of the trial. The tribunal, whenever it obtains the knowledge of the death of the spouse, will issue a decree of interruption, and the process remains suspended in case the heir, the successor or a person legitimately interested may wish to continue the case. They should be warned that the lack of a promotion can bring about the expiration of the process, if no procedural act is carried out within the time limit of six months (cf. c. 1520). To keep this from happening, the other party must petition the tribunal in suitable time, before the six months (c. 1592), or the heir, the successor or a legitimately interested party who did not appear in court would be declared absent (c. 1592). If the deceased had been the petitioner-spouse, and the new party who is substituting for him has not appeared, one can conclude that there is a renunciation of the instance (cf. c. 1594), although the respondent has the right to have the process continue. The expiration of the process will not prevent the possibility that, afterwards, one may again petition for nullity. Now those cases, once it is taken into consideration that during the life of the spouses the marriage had already been challenged, would not be governed by c. 1675 § 1.

The incorporation into the trial of some of the subjects enumerated in c. 1518 will bring to an end the previous examination of the interest upon which those subjects took their standing. The *CIC*, in contrast to the *PrM*, does not require the existence of "grave reasons," but rather the

55. Cf. C. DE DIEGO-LORA, commentary on c. 1517, in *CIC Pamplona*.

proof of the legitimate interest in order to acquire the status of the party, resolving in this way the controversy raised in the previous law.[56]

Nor does the norm dictate the need for a prejudicial status of the nullity with respect to another controversy, it is sufficient, as it was said, with the proof of the interest.[57]

The new party will be able to be both petitioner and respondent and fully acquires this status within the procedural relationship. Thus the person can adopt the procedural attitudes that in his opinion better protect his interest, without being bound to maintain the claims of the deceased spouse.[58] Technically speaking, what has been produced is a substitution in the capacity. The person substituted, different from the representative, is a true party, and although the right is not his in virtue of the acts of the process, (c. 1674 only concedes that right to the spouses and to the promoter of justice), the action is undertaken by virtue of his interest.[59] It is because of this, that the substitute acts in his name and his proper interest, while the representative does it in the name and in the interest of someone else. In conclusion, the substitute acts procedurally as it suits his own interest, whereas the representative always acts under the orders of the one being represented.

The intervention of the promoter of justice in the prosecution of the case is possible if reasons are found which legitimate his exceptional presence[60] as a party by his own right and not in substitution for one of the parties.[61] If he already has been acting because he was challenging the marriage (cf. 1674, 2°) it means that the reasons that sustain his intervention have been verified and he will consequently be present at the prosecution as a public respondent party.

c) *The concluded case*

Once the decree of the conclusion of the case is issued, c. 1518 prescribes that without interrupting the process ("the judge must continue [the case]"), the judge will cite the procurator, and, if there is not one, the heir of the deceased or his successor.

Taken in the context of our previous discussion, I suggest that the legislator contemplates a hypothesis that is procedurally different from what was studied before. As a matter of fact, the citation of the procurator (c. 1482) requires the presence in the court trial of the representative of the deceased party, without whom a substitute in the legitimation is

56. Cf. R. RODRÍGUEZ-OCAÑA, "La legitimación originaria y sucesiva en los procesos de nulidad matrimonial," in *Ius Canonicum* 27 (1987), p. 195.
57. Cf. S. BERLINGÒ, "Il processo," in *Diritto matrimoniale canonico* (Milan 1989), p. 237.
58. Cf. R. RODRÍGUEZ-OCAÑA, "La legitimación originaria...," cit., pp. 195–196.
59. Cf. A. DE LA OLIVA-M.A. FERNÁNDEZ, *Lecciones de Derecho Procesal* (Barcelona 1986), p. 336.
60. Cf. *Comm.* 11 (1979), p. 259.
61. Cf. G.M. USAI, "L'impugnazione del matrimonio dopo la morte...," cit., p. 49.

effectively removed. The procurator as the *alter ego* of the deceased spouse still has the mandate *ad lites* (c. 1484) in order to act in the name of the one being represented in the legal actions that take place between the conclusion of the case and its sentence. The *CIC* even recognizes the possibility of appeal (cf. c. 1486 § 2). The reason behind this presupposition resides in the acknowledgment that the case can be sufficiently instructed. Consequently the judge or tribunal "will be able to issue the sentence, if he has full knowledge of the matter because of what is alleged and proved" (c. 1606). If there is no procurator, which is possible, since his nomination is facultative, according to the *CIC* (c. 1482 § 1), the judge will cite the heir of the deceased or the successor of the deceased.

It can happen that after the conclusion of the case it might be necessary to obtain new proofs in accordance with the tenor of the reasons contained in c. 1600, which will give rise to the production of new proofs (cf. c. 1600 § 3). As for the admittance of new proofs on the part of the judge, or the fact that the said proofs can even be ordered ex officio, he makes these known along with the other matters. Although the decree of conclusion has already been issued, the judge realizes that the case is not sufficiently instructed, which is the equivalent to lacking full cognizance of the case, or he seeks to avoid the injustice of the future sentence. The interventions that take place immediately after (the procedure of admitting the proofs, the publication, etc.) require, in our opinion, that the judge cite the heir of the deceased or the successor of the deceased. It is not sufficient simply to have the presence of the procurator according to the tenor of c. 1518, 2°. For, if it is true that the procurator represents the party, there are actions that demand direct action and which go beyond the mandate *ad lites* executed by the procurator. These are actions (cf. c. 1485) which directly affect the right of the party and how this right is to be defended, and that the party is only entitled to its execution. The procedural acts to which c. 1600 gives origin are of this nature, namely, to give consent to the new proofs, which are being proposed, and so forth.

Finally, although the procurator can appeal the sentence even if he is the only one cited, the prosecution of the case must be carried out by the new party.[62] The determination of who the new party is must be taken from the prescriptions of c. 1518, 1°, which deals with the prosecution of the case.

62. Cf. J.Mª. IGLESIAS ALTUNA, *Procesos matrimoniales canónicos*, cit., p. 139, note 85.

ART. 3
De officio iudicum

ART. 3
The Office of Judges

1676 **Iudex, antequam causam acceptet et quotiescumque spem boni exitus perspicit, pastoralia media adhibeat, ut coniuges, si fieri potest, ad matrimonium forte convalidandum et ad coniugalem convictum restaurandum inducantur.**

Before he accepts a case and whenever there appears to be hope of success, the judge is to use pastoral means to persuade the spouses that, if it is possible, they should perhaps validate their marriage and resume their conjugal life.

SOURCES: c. 1965; *PrM* 65; *SN* can. 473

CROSS REFERENCES: cc. 1446, 1659 § 1, 1695

COMMENTARY

Antoni Stankiewicz

The administration of justice that aims at safeguarding the personal rights of the faithful must not diminish "the promotion of that ecclesial communion which is considered primary for all ecclesiastical legislation, and which must guide all the activity of the people of God."[1] For this reason, the present norm, in accordance with canonical tradition (*X* I, 36, 1), reminds the judge of his duty to put the principle of ecclesial communion into practice by means of reconciliation and peaceful settlements of disputes among the faithful.[2]

1. JOHN PAUL II, *Address to the Rota Romana*, February 26, 1983, in *AAS* 75 (1983), p. 556.
2. Cf. A. STANKIEWICZ, "I doveri del giudice nel processo matrimoniale canonico," in *Apollinaris* 60 (1987), pp. 210 ff.

In cases for the private good the judge can propose a settlement and arbitration (c. 1446 § 3) in addition to seeking an equitable solution to the controversy (counting on the mediation of the proper authorities (c. 1446 § 2). In cases for the public good, however, among which are those concerned with marriage nullity, the recourse to a settlement or to arbitration is excluded (c. 1715 § 1) for treating the rights of those whom the parties cannot provide for freely (c. 1691). It is precisely for this reason in cases concerning the marriage bond that the law requires of the judge only the canonical-pastoral duty to use pastoral means to persuade the parties, if it is possible, to convalidate their marriage and to renew their conjugal cohabitation. The judge can accomplish this duty both before the acceptance of the petition and during the course of the process, for example in the session for the concordance of the "*dubium*," or during the interrogation of the parties, or in another moment he considers adequate for this purpose.

This function, which the judge must personally exercise and not by sending the question to the ordinary, as was established in the previous marriage norms (*PrM* 65 § 1), should not be considered useless, since it expresses the genuine interest of the Church in protecting the stability of the marriage bond.[3]

There are several pastoral means at the disposition of the judge. The first, in the cases of nullity provided for by the law (cc. 1156–1160), is the simple convalidation of the marriage, which consists in the renewal of the matrimonial consent by one or by two of the parties by means of a new act of the will. In addition, there exists the possibility of directly asking the parties to renew their conjugal life. In this way, the ecclesiastical judge remains committed to the post-matrimonial pastoral duty of guiding the couple toward the realization of the values and the duties of their marriage within the scope of the ecclesiastical community (cf. *FC* 69).

3. Cf. *Comm.* 11 (1979), p. 260.

1677 **§ 1. Libello acceptato, praeses vel ponens procedat ad notificationem decreti citationis ad normam can. 1508.**

§ 2. Transacto termino quindecim dierum a notificatione, praeses vel ponens, nisi alterutra pars sessionem ad litem contestandam petierit, intra decem dies formulam dubii vel dubiorum decreto suo statuat ex officio et partibus notificet. § 3. Formula dubii non tantum quaerat an constet de nullitate matrimonii in casu, sed determinare etiam debet quo capite vel quibus capitibus nuptiarum validitas impugnetur. § 4. Post decem dies a notificatione decreti, si partes nihil opposuerint, praeses vel ponens novo decreto causae instructionem disponat.

§ 1. When the petition has been accepted, the presiding judge or the *ponens* is to proceed to the notification of the decree of summons, in accordance with can. 1508.

§ 2. On the expiry of fifteen days from the notification, the presiding judge or the *ponens* shall, unless one or other party requests a session for the joinder of the issue, within ten days by his decree determine ex officio the formulation of the doubt or doubts and notify the parties.

§ 3. The formulation of the doubt is not only to ask whether the nullity of the particular marriage is proven, but also to determine the ground or grounds upon which the validity of the marriage is being challenged.

§ 4. After ten days from the notification of the decree, if the parties have not lodged any objection, the presiding judge or the *ponens* is by a new decree to arrange for the instruction of the case.

SOURCES: § 1: *PrM* 74–86
§ 2: *PrM* 92; CPAC Rescr., 28 apr. 1970, 11
§ 3: *PrM* 88

CROSS REFERENCES: § 1: cc. 1505–1508, 1658–1659, 1686
§ 2: cc. 1513 §§ 2–3, 1661 § 1
§ 3: cc. 1683, 1644 § 1
§ 4: cc. 1516, 1529

COMMENTARY

Antoni Stankiewicz

1. In the process of marriage nullity, which has limited specific procedural norms, those norms concerning trials in general as well as those treating the ordinary contentious process, should also be employed, unless the specific subject matter demands otherwise (c. 1691). Thus, in this process one must submit a judicial petition (c. 1501) in accord with the dispositive principle, since the judge cannot officially hear the case ("nemo iudex sine actore") without the petition of the private party, who is either the spouse (c. 1674, 1°) or the promoter of justice (c. 1674, 2°). Therefore, the norms that refer to the contents of the libellus for the ordinary contentious trial are to be applied in the matrimonial trial. These norms specify the essential and integrating requirements for the judicial petition. They include: the "*petitum*" with the "*causa petendi*," together with a brief description of the facts and of the proofs to illustrate the basis for the petition (c. 1504), the indication of the domicile or quasi-domicile of the respondent, the signature of the petitioner or of his procurator, the place of the residence of the petitioner and the date of the brief, as well as those matters relating to the acceptance and rejection of the libellus (c. 1505).

The acceptance or the rejection of the libellus does not take place through the decree of the college of judges, even if it includes cases that refer to the marriage bond (c. 1425 § 1,1°, b), but through the decree of the president of the college or of the ponens. (This is for reasons of procedural promptness.)[1]

In the same decree ordering the libellus to be accepted there also appears the citation of the respondent (c. 1507 § 1), or of his curator (if the party does not enjoy procedural capacity) and the legal capacity of those who must intervene in the trial (c. 1508 § 3) such as the defender of the bond (c. 1434, 1°). Also in marriage cases, the libellus must be attached to the citation, unless, for serious reasons, the judge decides that the respondent should not receive it before he is interrogated (c. 1508 § 2).[2] If in his decision the judge denies the notification of the libellus, he must do so with strong motives, since in such a case one would not merely be dealing with a directive, but with a decree (c. 1617). Contrarily, when the judge does not so deny the notification, the respondent can raise an exception to the nullity of the judicial citation.[3]

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1. Cf. *Comm.* 8 (1976), p. 187.
2. Cf. *Comm.* 11 (1979), pp. 90, 261; 15 (1984), pp. 62–63.
3. Cf. A. STANKIEWICZ, "De citationis necessitate et impugnatione," in *Monitor Ecclesiasticus* 114 (1989), pp. 389–390.

Despite the legal expression "libello acceptato," which in marriage cases might exclude the possibility of an automatic acceptance of the libellus ("ipso iure": c. 1506), it must be understood that the nature of marriage cases does not prevent the operability of this provision in the marriage trial (cf. c. 1691). As a matter of fact, that norm was introduced to speed up the procedural "*iter*" in all cases, forestalling in a special way the negligence of the judge.[4] Therefore, in case of an automatic acceptance of the libellus, the judge will proceed to the citation of the respondent within twenty days from the presentation of the petitioner's request in which she had solicited its decision (c. 1507 § 2).

2. In the cases of marriage nullity defining the terms of the controversy must be accomplished within the formula of the "*dubium*" or of the "*dubia*," in the manner described within the ordinary contentious trial for the most difficult cases (c. 1513 § 2). The practice of the joinder of issues by means of the concordance of the "*dubium*" or of the "*dubia*," which in marriage cases is expressed by means of a ritual formula: "an constet de matrimonii nullitate in casu," was considered most useful by doctrine during the period when the *CIC*/1917 was in force., It was prescribed by the *CIC*/1917 without exception for the marriage nullity cases (*PrM* 88 and 92), even considering the adversarial reply from the defendant essential for the "*litis contestatio.*"

However, in the declarative actions, like those of the marriage nullity, the "*contradictio petitioni actoris*" which had to be concluded in the joinder of issues in marriages cases (c. 1726 *CIC*/1917; *PrM* 87), was interpreted in a broad sense, or, rather, as an answer of the defendant even though he or she had agreed with the petition of the plaintiff. But in those cases, at times, when verification of the joinder of issues in doubt, the other party may have become a "*consors actoris.*" Nevertheless, the effort to save the required "*contradictio*" was not abandoned with the recourse to the "*litis contestatio affirmativa,*" in which even the confession of the respondent could be integral to the joinder of issues, considering the nature of the trial, and of the interest of the respondent to obtain the judicial decision. In effect, "*contestari*" the "*litis*" meant "*simul testari,*" even "*super re petita.*"[5]

In the current law, in which defining of the terms of the controversy helps one arrive at the joinder of issues (c. 1513 § 1), and in which the cases of marriage nullity are arrived at by means of the establishment of the "*dubium,*" or of the "*dubia,*" the opposing positions of the parties in the majority of cases appear notably weakened, especially at the moment in which both parties are in accord concerning the plaintiff's petition, and consequently, about the formulation of the "*dubium.*"

4. *Comm.* 11 (1979), pp. 87–88; 15 (1984), p. 62.
5. Cf. *glossa* ad v. "responsionem," *X* I, 6, 54.

The formula of the "*dubium*" has to be fixed by the office of the judge (either the presiding judge or the ponens) by means of a decree, within fifteen and twenty-five days from the notification of the citation after the response of the respondent to the petition and the proposition of the "*dubium*" has been taken into account.

If one of the parties has requested a hearing for the joinder of issues, the judge cites both parties together with the defender of the bond for the session for a concordance of the "*dubium*" during which they come to an agreement on the decree of its formulation, both when the parties concur and when they disagree between themselves (cf. c. 1729 §§ 2–3 *CIC*/1917; *PrM* 92).

The parties must be notified of the decree which settles ex officio the formulation of the "*dubium*," and they are allowed a period of ten days before the same judge within which he can modify the formulation. The decision of the judge in this respect cannot be appealed (cc. 1513 § 3, 1629, 5°).

One might similarly describe the decree that establishes the formulation of the "*dubium*" in the session for the concordance. Above all, the notification must be made to the party who has not participated in the hearing, whether because they have relied upon the justice of the court or because they disagree with the petition of the plaintiff. In any case, this notification is never superfluous, insofar as it informs the parties of the object of the trial in proper juridic terms.[6] In addition, the party present at the hearing can also find him- or her- self in strong disagreement with the formulation of the "*dubium*" established by the judge and then, by means of the appeal, they can insist once again for the judge to reconsider his decision and modify the formulation.

3. In the cases of marriage nullity the specification of the "*res in iudicium deducta*" is brought about by means of the determination of the ground of nullity in the formulation of the "*dubium*" by whoever challenges the validity of the marriage (cf. NTRR, 62 § 1). The norm of § 3 adheres faithfully to the canonical practice concerning the necessity of specifying in the joinder of issues the ground of nullity of the matrimony at hand, a practice that in the previous period was commonly recognized (*PrM* 88), particularly in marriage trials. (CPAC, Rescript, April 28, 1970, no. 11). Therefore, they were not receptive to the formulation of the "*dubium*" which solely indicated the nullity of the marriage in question without the *ground* of nullity being apprehended. To them, this manner of proceeding placed greater stress upon the invalidating fact of the marriage rather than its "*nomen iuris.*" In fact, that proposal claimed to allow the judge to determine the ground of nullity or to change it up to the moment of the "*conclusio in causa.*"[7]

6. *Comm.* 15 (1984), p. 64.
7. *Comm.* 11 (1979), p. 261.

The introduction of the ground of nullity in the formulation of the "*dubium*," whether with the designation derived from the law (for example, "the nullity of the marriage in question has been decided for the reason of fear inflicted upon the petitioner," etc.), or from jurisprudence (for example, "because of the exclusion of the good of the offspring"), not only prevents a new introduction of the case on the same ground in the first instance, but also determines the definition of the double conformed sentence (cf. c. 1641, 1°) for the celebration of the new marriage (c. 1684) and the request for a new proposition of the case (c. 1644).

One should note that occasionally the invalidating fact of the marriage becomes difficult to define in a precise ground of nullity as articulated by the law or made readily apparent by jurisprudence, as, for example, if one is specifically treating an error which determines the will about the indissolubility of marriage (c. 1099), or of the exclusion of indissolubility (c. 1101 § 2). In any case, the judge cannot change ex officio the ground of nullity without hearing the parties and examining their reasons (c. 1514).

If the formulation of the "*dubium*" contains various grounds of nullity, these must be proposed in a subordinate or alternative manner in case they are incompatible with each other, as, for example, grave fear and total or partial simulation attributed to the same party in the case; the lack of sufficient use of reason and simulation, etc. If they are compatible, they are proposed in an equally primary form.

4. There is a prohibition also in force for the marriage cases from collecting the proofs before the opening of the instructive phase, which is occasioned through a decree of the judge (the presiding judge or the ponens), and which must allow ten days to pass from the notification of the decree that fixed the formulation of the "*dubium*."[8]

However, the exception established by c. 1529, which makes possible the acceptance of the proofs in the marriage trial before the joinder of issues for a grave reason, also has to be valid according to canonical tradition (*PrM* 68 § 2). In the decree for the opening of the instruction the judge can set the time period for the proposal of the proofs and for their completion (cf. c. 1516).

8. Cf. ibid.

ART. 4
De probationibus

ART. 4
Proofs

1678 **§ 1. Defensori vinculi, partium patronis et, si in iudicio sit, etiam promotori iustitiae ius est:**
1° examini partium, testium et peritorum adesse, salvo praescripto can. 1559;
2° acta iudicialia, etsi nondum publicata, invisere et documenta a partibus producta recognoscere.

§ 2. Examini, de quo in § 1, n. 1, partes assistere nequeunt.

§ 1. The defender of the bond, the legal respresentatives of the parties and, if involved in the trial, the promotor of justice also, have the right:
1° to be present at the examination of the parties, the witnesses and the experts, without prejudice to can. 1559;
2° to inspect the judicial acts, even if they are not yet published, and to examine documents produced by the parties.

§ 2. The parties cannot assist at the examination mentioned in § 1 n. 1.

SOURCES: § 1: cc. 1968, 1969; *PrM* 70, 71, 128; Signatura Litt., 19 nov. 1947; *SN* cc. 476 et 477; CPAC Rescr., 28 apr. 1970, 13 et 15
§ 2: *PrM* 128

CROSS REFERENCES: cc. 1501, 1559, 1598, 1674

COMMENTARY

Joan Carreras

1. The legislator desires that the marriage process respect the requirements of the dispositive principle, since the participation of the parties in the process is not limited to challenging the marriage (*nemo iudex sine actore*, cc. 1501 and 1674) but may extend throughout the development of the

trial, especially, as is the case here, in the probatory phase. In the process, they are the parties who must provide the probatory material in the trial that serves as the basis upon which the judge will determine his sentence. In order to issue the sentence, the judge must scrupulously limit himself to the examination of the material brought forward by the parties in the trial. This, of course, does not entail that the judge cannot use his own "lessons from experience" and the "known facts."[1] Thus does the dispositive principle come to take the place of the inquisitive beginning and quasi-penal idea of the former process of marriage nullity.

Previous procedural discipline held that the principle of the confidentiality of instruction ruled, in virtue of which only the defender of the bond was given the possibility of helping to study the proofs (*PrM* 128). The new norm has mitigated the principle of the confidentiality of instruction, establishing that not only the defender of the bond—as well as the promoter of justice, when he intervenes in the marriage trial—but also the advocates can assist in the examination of the parties, witnesses and experts. However, this norm merely attenuates the previous principle, since c. 1678 now establishes a precise distinction between public and private litigants, giving a distinct treatment to each group. For only the spouses, or better, the procedural private parties, are conceded the right to examine the judicial acts and the documents presented by the parties (c. 1678 § 2 *a sensu contrario*).

2. Recognizing that the advocates of the parties possess this faculty may be considered a means of guaranteeing the principle of the right to a hearing.[2] In virtue of this "ius defensionis perficitur facultate adducendi probationes utrique parti facta et servata."[3] At the same time, prudence and common sense must be respected. If c. 1559 generally stipulates that "the parties cannot assist at the examination of the witnesses ...," with greater reason still are they excluded from the procedure for nullity of marriage, given that the depositions normally have an intimately personal character. It is necessary, however, to safeguard the freedom of the witnesses and of the experts. In fact, in the *Schema* of 1976 nothing was said with respect to the parties. This is explained by the fact that, in answer to the suggestion of one of the consultors as to whether the parties could assist in gathering the proofs, and in questioning the expert witness as well as the parties, all gave a unanimous negative answer.[4]

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1. Cf. F. STEIN, *El conocimiento privado del juez* (Madrid 1990) (Spanish trans. by Andrés de la Oliva Santos).
2. Regarding the *ius defensionis* one can consult G. ERLEBACH, *La nullità della sentenza giudiziale "ob ius defensionis denegatum" nella giurisprudenza rotale* (Vatican City 1991); C. GULLO, "Il diritto di difesa nelle varie fasi del processo matrimoniale," in *Monitor Ecclesiasticus* 113 (1988), pp. 29–50; P. SILVESTRI, *Evoluzione del concetto di "diritto di difesa"* (Rome 1991).
3. Interlocutory sentence c. POMPEDDA, July 23, 1986, *Corporis Christi*, 122/86, no. 9.
4. Cf. *Comm.* 11 (1979), p. 263.

It does not seem that the right of defense of the parties is compromised so long as their respective advocates are permitted to have access to the gathering of the proofs, and so long as it is guaranteed that the parties can in all cases examine the judicial acts and the documents presented by the other party. This right, which we shall examine later, is recognized in the same c. 1678. In a broad sense one can speak of the *ius postulandi* as a right "to perform—either personally or through their patrons (c. 1490)—all the legitimate acts which allow for effective and definite judicial protection up until the final decision."[5] There is a possible problem when the parties represent themselves in the marriage process, that is to say, without the help of an advocate. In this instance, as a matter of fact, one can imagine that the right of defense and the principle of having a right to a hearing would demand that the party be able to assist in the afore-mentioned probatory acts, not in the role of a party, however, but rather in that of an advocate. We think, however, that neither the words of c. 1678 § 2 ("the parties cannot assist in the examination of what is treated in § 1, 1°") nor a correct understanding of the principle of the right to a hearing permit this interpretation. Nor would the right of defense of the party be seen as being harmed in the case where the advocate did not make use of the faculty conceded to him in c. 1678 § 1, 1°.[6]

3. Once it has been settled that the distinct treatment of the public and private parties in c. 1678 § 1, 1° has not infringed upon the right to a hearing, two other juridical problems of a different type and importance should be considered. In the first place, with a preliminary character and in a certain prejudicial sense, the distinct treatment permits one to a question whether the figure of the defender of the bond, as well as that of the promoter of justice,[7] does or does not possess the essential character of a party in the process. For if one considers that in canon law the idea of party can only refer to whoever holds the substantial juridical relationship[8] (the parties in a material sense), then the defender of the bond could not be considered as a party, since he is not a title holder of the juridical matrimonial relationship, but is only a defender of a juridical interest that is general and public.[9]

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5. J. LLOBELL, "Lo 'ius postulandi' e i patroni," in *Il processo matrimoniale canonico* (Vatican City 1988), p. 186; idem, "Il patrocinio forense e la 'concezione istituzionale' del processo canonico," in *Il processo matrimoniale canonico*, 2nd ed. (Vatican City 1994), pp. 439–478.

6. Cf. J. LLOBELL, "Il patrocinio forense...," cit., pp. 458–463.

7. Cf. M. MIELE, "Il promotore di giuzstizia nelle cause di nullità del matrimonio," in *Studi sul processo matrimoniale canonico* (Padova 1991), pp. 167–176.

8. In this sense A.M. PUNZI NICOLÒ, "Parte (Diritto Canonico)" in *Enciclopedia del Diritto*, XXXI (Turin 1981), p. 974.

9. Regarding the different doctrinal positions on the juridical qualifications for the defender of the bond one can consult the study of G. COMOTTI, "Considerazioni sull'istituto del 'defensor vinculi'," in *Studi sul processo matrimoniale...*, cit., pp. 124–129.

How one answers the question of the juridical nature of the defender of the bond could have repercussions on the second problem pointed out regarding cc. 1678 § 1°, and 1559. This latter canon establishes in a general way that "the parties cannot assist at the examination of the witnesses, unless the judge, especially when it occurs in a case of a private matter, considers that they have to be admitted. However, their advocates or procurators can assist at such examinations unless, due to the circumstances of the issue and of the persons involved, the judge thinks that the procedure should be done in a confidential manner." Given that c. 1678 § 1, 1° establishes the applicability of c. 1559, it is unclear whether in the marriage trials the prohibition of the judge concerns only the advocates of the parties, or if, on the contrary, it extends to the defender of the bond and to the promoter of justice. Whether they do or do not possess the juridical status of a party in the process, the doctrine seems to incline toward the second solution, to extend the temporary prohibition to the defender of the bond and to the promoter of justice from assisting at the proof of the witnesses, thereby proceeding in a confidential manner.[10] According to the majority of opinions in doctrine, the prevailing principle of equality demands strict interpretation in accord with c. 18, thus preventing the public parties from being able to hold procedural prerogatives beyond those that the law formally expresses. This is due to the strict connection that exists between the principle of equality and the principle of the right to a hearing.[11]

4. Regarding the publicity of the *acta judicialia*,[12] c. 1678 establishes another right of the public parties and of their advocates, a right which *a sensu contrario* extends also to the petitioners and the respondent and which gives them the authorization "to examine the judicial acts, even when they are not published, and to examine the documents presented by the parties" (c. 1678 § 1, 2°). The problem is not found wholly in this norm, but also in the closely related c. 1598, which establishes what has been called the "key norm of procedural legislation."[13] Indeed, for the sake of the principle of the right to a hearing, it is fundamental for the parties that their right be safeguarded to examine the facts that have been considered proven and which served as the basis for the judge's sentence.[14] How could the principle of the right to a hearing be considered

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10. In this sense J.J. GARCÍA FAÍLDE, *Nuevo Derecho procesal canónico* (Salamanca 1984), pp. 136–137, G. COMOTTI, "Considerazioni sull'istituto...," cit., p. 109, note 61; and G. USAI, "Il promotore di giustizia ed il difensore del vincolo," in *Il processo matrimoniale canonico*, cit., p. 140.

11. I. ZUANAZZI, "Le parti e l'intervento del terzo nel processo canonico di nullità matrimoniale," in *Il processo matrimoniale canonico*, cit., pp. 354–367.

12. Cf. *Comm.* 11 (1979), p. 264.

13. C. GULLO, "La pubblicazione degli atti e la discussione della causa (cc. 1598–1606, can. 1682 §2)," in *Il processo matrimoniale canonico*, cit., p. 289.

14. J. LLOBELL, "La genesi della sentenza canonica," in *Il processo matrimoniale canonico*, cit., p. 730–734.

honored if the judge were to issue the sentence that is based upon a proven fact but which had not been shown to anybody (c. 1098 § 1 *in fine*)?[15] It is not surprising, therefore, that the cited c. 1598 § 1 establishes under pain of nullity the duty of the judge to permit the examination of the judicial acts both by the parties and their advocates.

15. Cf. C. GULLO, "La pubblicazione…," cit., pp. 293–294.

1679 **Nisi probationes aliunde plenae habeantur, iudex, ad partium depositiones ad normam can. 1536 aestimandas, testes de ipsarum partium credibilitate, si fieri potest, adhibeat, praeter alia indicia et adminicula.**

Unless there are full proofs from other sources, then in addition to other indications and supportive elements, in order to weigh the depositions of the parties in accordance with can. 1536 the judge is, if possible, to hear witnesses to the credibility of the parties themselves.

SOURCES: c. 1975; *PrM* 137; *SN* can. 482

CROSS REFERENCES: cc. 1536, 1573, 1608

COMMENTARY

Joan Carreras

1. It is well known that the declaration of the parties, also called the judicial confession, can reasonably be considered the *regina probationum*, the queen of proofs. The reason is evident. In the instance where the private good comes into play, the judicial declaration of one of the parties against his or her own interests enjoys such a weight that the canonical legislator establishes that such a judicial confession "relieves the other parties from the burden of proof" (c. 1536 § 1). It is also a deeply rooted juridical principle, equally welcomed by the canonical legislator, that, when the public welfare is at stake, the judicial confession does not enjoy the value of full proof on its own, but it must be evaluated by the judge with the rest of the circumstances of the case (c. 1536 § 2).

2. Seeing that the norm contained in c. 1536 is so clear, one might ask why the legislator dedicates a new norm (*c. 1679*) for the evaluation of the declarations of the parties in the marriage trials. As a matter of fact, in the heart of the Commission, one consultor suggested that the present canon could be suppressed.[1] Such an opinion did not succeed, among other reasons, because c. 1679 adds an explicit reference to the "witnesses of credibility" and other indications and matters so that the judge can evaluate the declarations of the parties. In a certain way, the principle states that these parties, by themselves alone, do not qualify as constituting full proof against the validity of the marriage. It states also, however, that one must guard against an ensuing pessimism concerning human affairs, according

1. Cf. *Comm.* 11 (1979), p. 263.

to which people would always be inclined to lie for personal advantage, even in a subject so important and sacred as the sacrament of matrimony.[2] For this reason, in the cases, certainly hypothetical and always very rare, where one could come to obtain moral certitude about the invalidity of the marriage bond only through the confession of the parties, then it would be necessary that the judge attentively evaluate both the testimonies of credibility and other indications and matters.[3]

In other words, in a matrimonial matter the legislator adopts a position that must guarantee to the greatest extent the *favor veritatis*. In this way, it can happen that before the conflict between the apparent validity of the marriage bond and the claim to its nullity as affirmed and declared in the trial by the parties, the judge arrives at the moral certitude that the marriage never existed., This is done paying attention only to the declaration of the parties, which is always corroborated by the means mentioned in which the integrity of the parties are verified.

3. It is important to explicitly state here that one is not discussing an authentic conflict between the internal and the external forum, nor is it possible to think that such a situation can be frequently found. A conflict between the internal and external forum is not treated here because the demands of c. 1608 § 2 continue in force. This canon establishes that the judge must attain moral certitude *ex actis et probatis*, on the part of what is alleged and what is proved. Moreover, the reason that we are presented with this difficult and unusual scenario rests on the fact that a circumstance which caused the nullity of marriage can remain in the internal forum only remotely, without its emerging in one way or another in objective and external reality.[4] Otherwise, the moral certitude of the judge would not be an objectively authentic "certitude," because it would not be capable "of being transmitted to the parties and to the higher tribunal along with the motivations, of course understanding that such objectivity does not reside in each one of the proofs[;] but the power to produce moral certitude in any competent person through the material and in his good judgment lies in the objective capacity that all the indications and proofs taken together possess."[5] Therefore, one can conclude that "to suppose cases in which the moral certitude can only be attained in the internal forum, that is to say, within the scope of the conscience, is like constructing a 'scholastic academia,' since one such occurrence will be

2. Cf. M.F. POMPEDDA, "La questione dell'ammissione ai sacramenti dei divorziati civilmente risposati," in *Notitiae* 28 (1992), p. 480.

3. Cf. P. FELICI, Discourse, February 21, 1977, in *Comm.* 9 (1977), p. 180; M.F. POMPEDDA, "Il processo canonico di nullità di matrimonio: legalismo o legge di carità?," in *Ius Ecclesiae* 1 (1989) pp. 446–447.

4. Cf. PIUS XII, *Discourse to the Tribunal of the Roman Rota*, October 1, 1942, in *AAS* 34 (1942), pp. 338–342.

5. J. LLOBELL, "La genesi della sentenza canonica," in *Il processo matrimoniale canonico* 2nd ed. (Vatican City 1994), pp. 446–449.

really so rare that it must necessarily be considered as if it never happened."[6]

4. In reality, the problem studied here is intimately related to the probatory value of the declaration of a single witness (cf. c. 1573). One or the other scenario can take place especially in cases that are treated under the allegations of *metus* or simulation of consent. Concerning the first of these allegations of nullity, analyzing the more recent jurisprudence in the matter, Pompedda points out that "the rotal sentences have declared that credit must be given to the declarations of that person who has been the victim of threats: one is dealing with an internal act and, therefore, the one declaring that he has been pressured must be believed, provided that that person can convince the judge that his declaration is completely worthy of belief."[7] On the contrary, according to the same author, in the matter of simulation, rotal jurisprudence continues to be very reticent in giving probative value to the confession or the declaration of the one simulating. In these situations it continues to apply the same parameters as the previous legislation, that is to say, the need to pay close attention to the so-called *causa simulandi* and the "other elements" to which c. 1536 refers.

6. M.F. POMPEDDA, "Il valore probativo delle dichiarazioni delle parti nella nuova giurisprudenza della Rota Romana," in *Ius Ecclesiae* 5 (1993), p. 451.

7. Ibid.

1680 **In causis de impotentia vel de consensus defectu propter mentis morbum iudex unius periti vel plurium opera utatur, nisi ex adiunctis inutilis evidenter appareat; in ceteris causis servetur praescriptum can. 1574.**

In cases concerning impotence or defect of consent by reason of mental illness, the judge is to use the services of one or more experts, unless from the circumstances this would obviously serve no purpose. In other cases, the provision of can. 1574 is to be observed.

SOURCES: cc. 1976–1982; *PrM* 139–154; SCHO Decr. *Qua singulari*, 12 iun. 1942 (*AAS* 34 [1942] 200–202); *SN* cc. 483–489; CPAC Rescr., 28 apr. 1970, 17; Signatura Rescr., 10 nov. 1970, 2 et 3; Signatura Rescr., 2 ian. 1971, II, 2 et 3

CROSS REFERENCES: cc. 1084, 1095, 1574, 1578 et 1702

COMMENTARY

Joan Carreras

1. From a systematic point of view, it is interesting to stress that at this point the legislator gives equal treatment to the impediment of impotence and cases of defect of consent due to "mental illness," demanding that the judge utilize the help of one or more experts. This means, on the one hand, that there is a difference regarding grounds of nullity, whose general principal governs the procedural treatment by virtue of which recourse to the experts is at the discretion of the judge (cf. c. 1574). It emphasizes, however, that impotence and the defects of consent in a certain sense share the same juridical nature, that is to say, the persons involved are taken for granted as being subjectively incapable of contracting marriage on account of a more or less permanent and pathological condition. Because we are dealing with "incapacities," when any doubt exists (whether it be of fact or of law) about the incapacity of the ones contracting marriage (cf. c. 1084), not only the judge but also whoever is assisting at the celebration of the marriage must always presume their capacity. This is not the case with other impediments, since, when there are doubts about their existence, it is necessary to clear up these doubts beforehand. For one cannot celebrate the marriage while there is no moral certitude that nothing stands in the way of its valid and licit celebration.

2. If impotence (c. 1084) and consensual incapacity (c. 1095) appear today as being regulated in distinct headings of the *CIC*, it is for historical reasons, but the present canon contributes to a systematic contemplation

of their integration. In fact, precisely in the area of the expert witness, canonical tradition has always provided similar treatment for both grounds of nullity (cf. cc. 1979–1682 *CIC*/1917 and *PrM* 139). We are therefore treating a norm which presents a perfect continuity with canonical tradition and which cannot in any way be called new. It is possible to notice, however, that the legislator has introduced two modifications in respect to the previous norm.The first modification consists in suppressing the direction that a corporal inspection be performed in accord with the norms of Christian modesty, in so far as it was suggested that these rules are also prescribed by professional ethics. The second modification consists in adding the expression "unless, due to the circumstances, it is clear from the evidence that that practice would turn out to be useless,"[1] a statement which c. 1976 *CIC*/1917 reserved for the cases of non-consummation. Canon 1680, however, not only has omitted every reference to the causes of non-consummation (cf. c. 1976 *CIC*/1917; c. 1702), but in addition, has simplified the matter of the number of experts,[2] now leaving it to the prudence of the judge. In reality (and departing from the previous norm) it is sufficient that the judge utilize only one expert if he thinks it advisable both in the cases of impotence and in those cases of consensual incapacity.

3. Despite the strict connection that exists between the subject of impotence and consensual incapacity, it must be recognized that in recent decades the field of psychological and psychiatric expertise has taken on a greater importance, and now exceeds the causes of impotence, with the exception of those that have a psychic-functional origin. An abundant bibliography exists on the topic, since the limits that separate the required interventions of the experts and the function of the judge are not easy to delineate.[3]

Canon 1680 prevents the judge from becoming an expert specialized in psychiatry, more inclined to psychoanalytic reasoning than a strictly juridical evaluation of the facts. Except for when the uselessness of the expert is evident, the judge is obliged to use one or several experts. In this way, a dialogue between the judge and the expert, between juridical knowledge and psychology or psychiatry, is encouraged.[4]

But if it is prejudicial for the judge to exceed his given function and assume competencies that are exclusive to the expert, it is still worse if he neglects his true mission, which is to judge the case, forgetting the maxim *iudex peritus peritorum*. Along this vein, we should consider the criteria brought forward by the Supreme Pontiff in a celebrated address given to

1. *Comm.* 11 (1979), p. 264.
2. Cf. B. GIANESIN, *Perizia e capacità consensuale nel matrimonio canonico* (Padova 1989), pp. 101–102.
3. Cf. S. GHERRO-G. ZUANAZZI (Eds.), *Perizie e periti nel processo matrimoniale canonico* (Turin 1993).
4. Cf. E. JULLIEN, *Juges et avocats des Tribunaux de l'Église* (Rome 1970), p. 259.

the Tribunal of the Roman Rota in 1987. This address propounded that the approaches adopted by some psychiatric movements, namely those incompatible with Christian anthropology, should not be "uncritically accepted by ecclesiastical judges ... The evaluation of the nullity of marriage belongs exclusively to the judge. The function of the expert consists solely in offering elements related to his specific competence, that is to say, the nature and level of the psychic 'realities' in virtue of which the declaration of the nullity of the marriage has been requested."[5] All in all, it does not belong to the expert to say if the nullity of the marriage is proven or not. A statement by an expert that concludes its analyses by declaring the marriage of the spouses null because of consensual incapacity would be invading the sphere of the judge. Therefore, the judge not only remains unfettered to such a technical opinion, but he ought to assert his authority, correcting such abuses on the part of the experts. The judge is obligated to critically evaluate the opinions of the expert and, in short, it is always he who has to evaluate the implication of the malady or the psychic disturbance in the capacity of the subject.

The judge would have to bear in mind two kinds of criteria, some intrinsic and others extrinsic in character.[6] The first refers to the person of the expert, and these can be summarized into two: their probity of life and practices and their technical-professional competence. The criteria of intrinsic character are more delicate in so far as they refer to the content itself of the work of the expert. Those that the legislator presents in c. 1578 § 2 are a good start: "Experts must clearly indicate the documents or other appropriate means by which they have verified the identity of persons, places or things. They are also to state the manner and method followed in fulfilling the task assigned to them, and the principal arguments upon which their conclusions are based," and in § 3: "If necessary, the expert may be summoned by the judge to supply further explanations."[7]

5. JOHN PAUL II, *Discourse to the Tribunal of the Roman Rota*, February 5, 1987, in *AAS* 79 (1987), pp. 1453–1549, nos. 5 and 8.

6. On this point we follow B. GIANESIN, *Perizia e capacità ...*, cit., p. 153.

7. Cf. B. DE LANVERSIN, "L'importance du can. 1578, par. 3, dans les procès matrimoniaux," in *Studio Rotale* 4 (1989), pp. 49–58.

ART. 5
De sententiaet appellatione

ART. 5
The Judgement and the Appeal

1681 **Quoties in instructione causae dubium valde probabile emerserit de non secuta matrimonii consummatione, tribunal potest, suspensa de consensu partium causa nullitatis, instructionem complere pro dispensatione super rato, ac tandem acta transmittere ad Sedem Apostolicam una cum petitione dispensationis ab alterutro vel utroque coniuge et cum voto tribunalis et Episcopi.**

Whenever in the course of the instruction of a case a very probable doubt arises that the marriage has not been consummated, the tribunal can, having with the consent of the parties suspended the nullity case, complete the instruction for a dispensation from a non-consummated marriage, and in due course forward the acts to the Apostolic See, together with a petition for a dispensation from either or both of the spouses, and with the opinions of the tribunal and of the Bishop.

SOURCES: cc. 1963 § 2, 1985; SCDS Regulae, 7 maii 1923, 3, 4 (*AAS* 15 [1923] 392); SCEC Instr. *Quo facilius*, 10 iun. 1935, art. 4 (*AAS* 27 [1935] 334); *PrM* 206; *SN* cc. 471 et 492; SCEC Instr. *Instructionem quo*, 13 iul. 1953, art. 5; SRR Nuove norme, 27 maii 1969, Appendix II, 2; SCDS Instr. *Dispensationis matrimonii*, 7 mar. 1972, Ie (*AAS* 64 [1972] 246~247); Signatura Decr. *Precibus diei*, 6 apr. 1973; SRR Normae, 16 ian. 1982, Allegato I, 2 (*AAS* 74 [1982] 516)

CROSS REFERENCES: cc. 1422, 1425 §§ 1 et 4, 1432, 1452, 1459, 1462, 1472 § 1, 1505, 1°, 1507, 1513, 1524 § 3, 1587, 1589, 1607, 1617–1618, 1677–1678, 1683, 1686–1688, 1697–1706, 1752

COMMENTARY

Carmelo de Diego-Lora

I. THE PREVIOUS ORGANIZATIONAL MATTER

This canon is organized in a difficult way. At first sight, observe that its content has nothing to do with the heading of art. 5, *De sententia et appellatione*, in chapter I, dedicated to the cases of marriage nullity. It is not that it has no relation with these cases, but rather it has no relationship at all with the sentence or with the appeal. It discusses, in a most particular way, the initiation of the procedure for the dispensation from a ratified but non-consummated marriage, and as such could be placed behind c. 1699. However, it also refers to the process of marriage nullity, since this way of beginning the procedure to obtain the dispensation has as an immediate precedent a process of nullity of marriage in which the tribunal of justice, (being competent for the nullity), decides that the judicial instance is suspended in giving way to an administrative procedure directed to solicit a dispensation from a ratified but non-consummated marriage, which the Apostolic See has to grant.

Canon 1963 § 2 *CIC*/1917, which regulated this phenomenon of change in a parallel manner, was included in the initial chapter dedicated to the determination of the competent forum within the title destined to regulate so-called matrimonial cases. It was thought of, then, as a change of forum of competencies once and for all. However, it was even something more, since in addition it resulted in a change of the jurisdictional order itself. Therefore, although the competence of the same tribunal who is examining the nullity seems to remain intact, there was a passage from a forum of the judicial power to a forum of the administrative power (in charge of a dispensation), with the consequent changes of competent authorities to examine and to decide, as well as the compliance of the distinct norms of procedure. In *PrM*, 206, on the contrary, the systematic place of this supposition is the same as that in the current c. 1681 in the heading dedicated to the judgment, although, in the last article, it was implicitly noted that the subject, procedurally speaking, belonged to the extinction of the process of nullity itself. However, in said article, just as in the current *CIC*, it was also mentioned that the administrative channel must be followed.

Without a doubt, the provision contained in c. 1681 is a norm with two purposes. First, it is presented as putting an end to a jurisdictional order, the judicial order initiated at the instance of the party (although it uses the term suspension) and, second, it gives way to a new order, the

administrative order, instigated by a decision of the proper tribunal of justice. Thus these systematic contradictions of the normative bodies are explained. This explanation, in turn, denotes the complexity of the canonical procedural system, which is often made subservient to pastoral demands that mitigate the rigor of the juridical forms in order to adapt them, when suitable, to the demands from another jurisdictional field in which it is understood that, in the definitive case, the supreme law of the Church is fully actualized (cf. c. 1752). Such complexity highlights, in the first place, the normative unity of the Church and the concentration of powers in hierarchical bodies. But it also imposes upon us the need to make a thorough analysis of the elements that are integrated in the total phenomenon of change that is produced in the distinct juridical functions of the one jurisdictional totality.

II. The Decree of the Tribunal of Justice

1. *Analysis of the decree of the tribunal*

The word "decree" is used here because there is no definitive sentence at this time. This decision of the tribunal does not resolve the principal cause, and for this reason it is not a definitive sentence (cf. c. 1607). On the contrary, it does decide that such a sentence will not be pronounced in the judicial process that has been initiated. That is to say, it produces an extinctive effect, analogous to that which, in procedural doctrine, some authors called the definitive turning point in the process. Such a judicial decision is similar to the interlocutory sentences or the decrees that have definitive force because they put an end to the process, according to the description of c. 1618.

The *CIC* does not point out the different hypotheses that recommend the carrying out of each formal type of these judicial decisions with certainty. However, here we choose the figure of the decree and not an interlocutory sentence, which has to be motivated (cf. c. 1617) with the force of a definitive sentence, in order to understand the latter as an act of greater solemnity by the tribunal when they have brought up an interlocutory matter of such importance that they must resolve it with all the formal requirements which justice requires for the extinction of the process. Thus it can happen with the tribunal's acceptance of a procedural exception that impedes the process from continuing to the definitive sentence, such as the lack of procedural capacity, of legitimate mandate or of jurisdiction, or of cases of the adjudged matter, transaction, etc. (cf. cc. 1459, 1462). These judicial decisions are not definitive sentences, but in the process they have this force. On the contrary, in our case, as the canon states,

it is sufficient that there arise in the instruction a very probable doubt about the non-consummation of the marriage.

Besides, the tribunal will continue to effectively instruct the case, although with a different purpose, since it is not now trying to prove the nullity but rather the non-consummation. The judicial acts are not put into the archives, but they remain distinct from their original intended use, although in the future the already attempted proofs acquire a new meaning. Apparently it seems that the instruction, begun before the judicial decision which concludes with the proper activity of the trial and which foreshadows the new procedure, remains under the power of the same tribunal. It is because of the lack of any external solution of this break that we understand the judicial form of the motivated decree to fit better with the judicial expression of the change mandated. Now, such a lack of a solution for continuity is only apparent because, though the continuous instruction of the case, and later on just like the acts which had already been examined (cf. c. 1702), they remain under the competence of the same tribunal. However, this tribunal ceased being the body with judicial power and became administrative. Similarly, on an occasion in which a change is regulated in the procedural relationship as important as the one provided by c. 1514, the word decree is also used by the *CIC*. Although these two decrees are quite distinct from each other, there is a certain similarity between them inasmuch as they are originators of essential changes in the process.

We have always referred to a decree of the tribunal of justice, or, in other words, the collegial body. Canon 1681 refers to the tribunal, since the trials of marriage nullity, a formal area where the judicial decree takes the place of the object of study, are reserved, by c. 1425 § 1, 1°, to a tribunal of three judges. However, in the cases of nullity which are handled according to the documentary process (cf. cc. 1686–1688), as well as for the first instance of other marriage nullity cases, in the hypotheses authorized in conformity with c. 1425 § 4, (which, in the first instance, permits a single clerical judge), it is not a collegial tribunal but a single judge tribunal that is discussed. Thus, in these cases, if that doubt were to arise about the competent judge who fulfilled the judicial decree of jurisdictional change, it should be understood that this single judge, at first only competent for the judicial process, will be competent not only to issue the decree, but also, according to our opinion, to continue the instruction oriented henceforth to prove the non-consummation of the marriage, although the canon prescribes nothing in this respect. In most cases, however, such competence will belong to a collegial tribunal, which justifies our using, in a general sense, the term tribunal in the manner of the canonical norm.

2. *The first aspect of pronouncement contained in the decree*

The first decision the decree of the tribunal presents is that of a statement which put an end to the process itself. From this aspect it is possible to qualify it as a constituent decree. In *CIC*/1917 the extent of the change from the trial of nullity to that of impotence is limited. In the new *CIC*, however, the assumption is extended to every case of nullity and for this reason we understand that the change of the documentary process can also be effected. In a certain sense, this was previously made, through a sort of extensive interpretation done by *PrM*, 206 § 2.

a) *Requirements*

In the canonical process in general the principle of the initiative of the party (cf. c. 1501) and of the petition (that which is being sought, as stated in c. 1504, 1°) rules, and even for the formulation of the doubts the judge or the tribunal depends on the cited principles (cf. c. 1513). These principles are reflected equally in the nullity trial of marriage (cf. c. 1677). The judge or tribunal, despite the ample faculties ex officio that are recognized by c. 1452, cannot make any important change, once the procedural relationship arises by the citation of the respondent, if it is not by decree, which must be motivated, based on a serious cause, at the request of the party after the other parties have been heard (cf. c. 1514). With these precedents, it is logical that a change like that which c. 1681 authorizes, requires the consent of both litigating parties, and along with this it must be understood that the defender of the bond is included (cf. c. 1432).

Thus the requirements for a change continue to be defined. First of all, as a prerequisite there is the objective requirement, which amounts to any process of marriage nullity, and second, there is the subjective requirement, consisting of the express consent of those who are parties in the process, including the defender of the bond. The third requirement is that the initiative can proceed from the parties themselves, but also it is possible that it might proceed by means of a suggestion ex officio of the tribunal, since the doubt arose, although the parties have to give their consent. Fourth, there must be a very probable doubt concerning the consummation, a causal requirement, and justification of the change that is judicially decreed.

As Marchetta has correctly pointed out,[1] one must always conceive the procedure *super rato* as being mediated through the request of the spouses because it is inconceivable that it would be against their will. For such a motivation it must be added that the practice of the Congregation is that the concession of the dispensation by the Roman Pontiff is always

1. Cf. B. MARCHETTA, "El processo 'super matrimonio rato et non consummato' nel nuovo Codice di Diritto Canonico," in *Studi in honore Aurelio Card. Sabattini* (Vatican City 1984), p. 410.

preceded by the petition of one or both spouses. In our judgment, this required consent of the spouses through the tribunal is fulfilled in the same c. 1681, with the petition for the dispensation made by one or by both spouses. However, between each declaration of the will of the spouses there is one radical difference since that *consensus partium* in the first part of c. 1681 emerges as a requirement *sine qua non* according to which the judge can suspend the marriage nullity case. At the same time, the petition for the dispensation by both or by one of the spouses presupposes that the judicial case of nullity has already been transformed into an administrative procedure, in order to instruct the proof of the non-consummation, and it is sufficient to be solicited in an analogous manner to the dispositions of c. 1697.

b) *The efficacy of the decree*

The extinctive character of this first decretal pronouncement was mentioned from the first moment, despite the literal terms of the canon: *suspensa de consensu partium causa nullitatis.*

The Latin word "*suspensa*," or "suspension" has not been employed, in our judgment, with a significant intention of a specific method of procedural paralysis. An act of suspension of a process evokes the idea of a procedural act on the initiative of the party or directly effected by the judge. The purpose of this act is to stop the process in order to raise a new issue, and to demand an independent decision which requires a particular procedure, but it must not distort the final function of the judicial instance (cf. c. 1517). Up to the point where such a matter has not been decided, the process remains suspended, to be renewed again once the matter is resolved. Such a phenomenon coincides with the concept of an incidental case, like that defined by c. 1587. If, in addition to this, it requires a special resolution before the principle sentence, as is suggested in cc. 1588 and 1589, the intervention of a third party in the case also causes a suspension, as is deduced from c. 1596. The objection also brings with it the suspension of the case until it is resolved (cf. c. 1451 § 2). In a similar way the timely allegation of dilatory exceptions (cf. c. 1459), of incompetence (cf. c. 1460) and of the so-called mixed matters (cf. c. 1462 § 1), bring with them the effect of the suspension of the principle case until the exception that was brought up is resolved by the judge. Now, in none of these hypotheses of suspension is this term used by the *CIC*. In exchange, it is used in cases such as the death of one of the parties, or one leaves his or her office, or there is a change of status which calls for a successor (cf. 1518, 1°), or for the time when the guardian or the curator or the procurator ceases in his duties (cf. c. 1519). In each case it is stated that the instance remains suspended. These are the cases that are usually called "interruptions" by the procedural doctrine because, as opposed to suspensions, they are not derived from an act directly proceeding from the will, but from irrelevant facts and events that take place, with certain changed consequences, in the process. It is not possible to speak of the fact that

these different hypotheses can be confused with the so-called phenomenon of the detention of the case, which can give rise to the effect of expiration (cf. c. 1520).[2]

Each one of these phenomena falls within the process paralyzing it, but each is considered in one way or another because the distinct cases of the paralyzation, once they cease, equally do not permit the process to be renewed and to be continued up to the sentence without any change at all. The types of incidences that arise within the trial are diverse, and specifically in the case of the suspension, once the question that provokes the incidental case, is resolved. If that continues, it will be done with the same identical features of the process which had begun and with all the elements which are integrated into it, up to the sentence, with the goal of the proper jurisdictional order of judicial power.

Hypothetically, one could raise the problem of whether the transition to the pontifical dispensation by means of the administrative procedure *super rato* of c. 1681 is actually an incidental case which emerges in the process of nullity. This would suspend this principal process so that it might be resumed later on, once the dispensation is obtained or denied. To this question we have already implicitly responded in the negative. In our opinion, the terms *suspensa causa nullitatis* have to be understood as being used only in the instrumental sense as describing the way to proceed for the jurisdictional change, but what it actually means is that the judicial decree extinguishes the aforementioned judicial case causing it to give way to another distinct order of procedure belonging to the administrative jurisdictional order.

Norm I/a of the instruction *Dispensationis matrimonii*, of March 7, 1972 made it quite clear[3] that a directed administrative proceeding treats the purpose of obtaining a favor and this is not so in a judicial trial. Also in its norm I/e it is manifestly put forth that we are not dealing with a suspension of the case of nullity. Instead, the judicial decision initiates a new order of procedure that essentially has no relationship with the previous one other than that of the conservation of the value of the acts of proofs, which should be considered for the new jurisdictional order, begun by judicial decree, if the aforementioned proofs secure the probability that the marriage was never consummated. In reality, what the same tribunal has to do in the future, as an instructor of the procedure *super rato*, is to complete the proofs, and it will concentrate exclusively upon the subject of non-consummation, while the procedural object of the nullity case will remain abandoned in the future, because what will be sought afterwards from the judicial decree is only and exclusively for the purpose of proving the non-consummation.

2. Cf. L. DEL AMO, *Sentencias, casos y cuestiones en la Rota Española* (Pamplona 1972), no. 114, 5.
3. Cf. *AAS* 64 (1972), pp. 242–252.

Although constricted within its procedural limits, the permanence of the probatory value in the *CIC* which allows the determined proofs to contain processes distinct from those in which they have been initiated, has particular possibilities in the cases of extinction of the process by reason of the expiration of the instance (cf. c. 1522) or by its renunciation (cf. c. 1525). It belongs to the distinction which c. 1472 acknowledges among those acts that are referred to the substance or to the acts of the case confronting the acts relative for the form of proceeding. By judicial degree the constitution of a new juridic situation between the spouses, who previously were parties in litigation and now are subjects of a procedure of a quite different nature (cf. c. 1701). Those acts of proof from the judicial case are deemed substantial acts, the value of which transcends the new jurisdictional order that has been initiated.

3. *The second aspect of the decree of the tribunal*

The second effect of the decree of the tribunal consists in the self-mandated order to carry out the instruction of the procedure for the dispensation from the ratified, but non-consummated, marriage. Such an instruction is not yet procedural, but administrative. In this context, the very tribunal that was examining the case of nullity will now turn its efforts toward the examinations of the proofs of the non-consummation. We cannot forget that usually it is the diocesan tribunals to which the bishops will entrust it in each case, the probatory instruction in the procedures of the non-consummation, as c. 1700 clearly presents, and either such a procedure is instructed according to c. 1699 or as a second effect of a case of previous nullity. In both cases, at the time for examining the proofs, the norms of the ordinary contentious process and those for marriage nullity cases rule, which achieve, according to c. 1702, a purely instrumental-probatory value, which also holds for the final result where the pontifical dispensation is granted. But such a probatory activity is not yet accomplished in the context of a procedural nature. It is for this reason that there is no publication of the acts (cf. c. 1703 § 1), nor will the advocates who act in the case of nullity be able to examine the procedural acts of c. 1678, since these offices cease in the procedure of non-consummation in order to let the case pass in which only the spouses alone can have the assistance of an expert in the law, when it is allowed (cf. c. 1701) in proving the non-consummation (cf. norm II/e of the instruction *Dispensationis matrimonii*). Although the canon says nothing about it, it is logical that in this probatory instruction the defender of the bond will always have to be present (cf. c. 1701 § 1).

There remains the elimination of the joinder of the issues, and, although the same tribunal which tried the nullity continues instructing the proof of the non-consummation, it does this not to elaborate a probatory

matter with which the sentence has to concern itself, but for the purpose of its being sent to the Apostolic See, joined with the petition for the dispensation made by both or one of the spouses. In order to extinguish the nullity case, changing this process into a procedure of non-consummation, the consent of all the parties who are a part of the trial in an analogous way to what is mandated for the renunciation of the instance (cf. c. 1524 § 3) is necessary, but the petition of one of the spouses is enough for the petition of the dispensation itself, just as c. 1697 permits.

Given the acts which it transmits to the Apostolic See, once the investigation for the dispensation has been made, the tribunal will cast a vote, to which will have to be joined the vote of the bishop. The *votum* of the bishop was omitted in the first drafting of the canon. However, in the session of the *Coetus studiorum de processibus*, of March 26, 1979, with the unanimous *placet* of the consultors, the necessity for the *votum* of the bishop was introduced.[4] This *votum* of the bishop, which was not provided for in the redaction of c. 1963 *CIC*/1917, (but which was considered for the norm II/e of the cited Instr. *Dispensationis matrimonii* as now being expressly required along with the *votum* of the tribunal in virtue of c. 1681), underlines that central value which the *votum* of the competent bishop has in each instance when the acts are sent to the Apostolic See, in conformity with cc. 1704 and 1705 § 1.

Later on, the original competence of the tribunal for the case of nullity which seems to be extended afterwards, attributed to *ope legis* by cc. 1681 and 1700 § 2, in regard to the instruction for the non-consummation, disappears completely. This is despite the fact that some of the probatory tools, displayed in the case of nullity, can serve as a means of proof for the non-consummation, and also to illustrate the existence of the just cause (cf. c. 1698 § 1). That attribution *ope legis* of the new competence in favor of the tribunal which it already had by reason of the nullity, will be an administrative competence and in the future its manner of acting will be administrative, although it is carried out *more iudiciali* (cf. c. 1702). The classical distinction, brought out by c. 1472 § 1, between the *acta processus* and *acta causae*, allowsfor the further distinction, in the same process, of the acts which expire when the instance itself effects it and the acts which preserve their validity and efficacy, if they are later alleged, going far beyond the instance of origin (cf. cc. 1522 and 1525, respectively, for the expiration of the instance and for its renunciation).

When the new competence assumed by the tribunal ceases (the last act of which in the procedure of non-consummation consists in the sending of its *votum*), and the necessary *votum* of the bishop has also been sent, the acts will be remitted to the Apostolic See, so that it may exercise its juridic power which c. 1698 recognizes as singularly belonging to it,

4. Cf. *Comm.* 2 (1979), p. 264.

and the dispensation can be conceded by the Roman Pontiff. The acts have been introduced definitively within the limits of administrative jurisdiction which is proper for that of non-consummation, and the proceedings cannotbe reversed, in the future these will only follow the occurrences which are, according to cc. 1705 and 1706, characteristic.

1682 **§ 1. Sententia, quae matrimonii nullitatem primum declaraverit, una cum appellationibus, si quae sint, et ceteris iudicii actis, intra viginti dies a sententiae publicatione ad tribunal appellationis ex officio transmittatur.**

§ 2. Si sententia pro matrimonii nullitate prolata sit in primo iudicii gradu, tribunal appellationis, perpensis animadversionibus defensoris vinculi et, si quae sint, etiam partium, suo decreto vel decisionem continenter confirmet vel ad ordinarium examen novi gradus causam admittat.

§ 1. The judgement which has first declared the nullity of a marriage, together with the appeals, if there are any, and the other judicial acts, are to be sent ex officio to the appeal tribunal within twenty days of the publication of the judgement.

§ 2. If the judgement in favour of the nullity of the marriage was given in first instance, the appeal tribunal, after weighing the observations of the defender of the bond and, if there are any, of the parties, is by its decree either to ratify the decision without delay, or to admit the case to ordinary examination in the new instance.

SOURCES: § 1: c. 1986; *PrM* 212 § 2; *SN* can. 493; *CM* VIII § 1; *CMat* VIII § 1
§ 2: *CM* VIII §§ 2 et 3; *CMat* VIII §§ 2 et 3; PCIDSVC Resp., 31 oct. 1973 (*AAS* 65 [1973] 620); PCIDSVC Resp., 14 feb. 1974 (*AAS* 66 [1974] 463); PCIDSVC Resp., 1 iul. 1976 (*AAS* 68 [1976] 635)

CROSS REFERENCES: cc. 1431, 1433, 1435, 1436 § 1, 1474 § 1, 1520, 1600, 1608 § 2, 1617, 1628–1640, 1641, 1642 § 1, 1643–1644, 1677, 1684 § 1, 1691

COMMENTARY

Carmelo de Diego-Lora

I. The Special Quality of the Appeal

Chapter I, *De causis ad matrimonii nullitatem declarandem,* on which this canon is based, is systematically included under part III, *De quibusdem processibus specialibus.* However, the specifics that make the

process *ad matrimonii nullitatem declarandam* special also have the broad application of the norms contained in the canons to which c. 1691 refers, namely, those of trials in general and of the ordinary contentious trial. This means that the special process of nullity of marriage not only has the effect of a rather ordinary use in the judicial tribunals of the Church, but also serves as a propitious occasion in which the greater part of the canons about trials in general, and of the ordinary contentious trial specifically, is applied by the tribunals. It is thus an occasion for the parties and advocates in question to observe these canons before the tribunal.

Canon 1682 is quite expressive in this sense.While it highlights in its two paragraphs the specifics of the appeal of the sentences that are issued in the first instance for the nullity of the marriage,yet, at the same time, everything that the canon does not regulate must be understood as subject to the canons for the ordinary process (cf. cc. 1628–1640).

Regarding the appeal of sentences issued in the cases of marriage nullity, recent scholarship has undertaken the study of the different models of appeal, as the more recent manuals of procedural canon law or the various commentaries to the *CIC* attest. Doubtless, the appeal of sentences is a procedural topic so important that it cannot escape the notice of any author who has dealt with the cases of marriage nullity.[1]

Strictly speaking, the first and best known element of appeal in the cases of marriage nullity resides in the fact that there are various norms for the appeal of sentences according to the sense and the moment of the judicial pronouncement. We shall analyze them next.

1. *An appeal of the sentence which does not consent to the claimed marriage nullity*

At first it appears that there is nothing peculiar here. But an appeal in these cases has a particular significance. It deals with an ordinary recourse against the sentence, and *mutatis mutandis* what is stated here can be applied for the appeal to any other sentence or motivated decree that is issued in these processes of marriage nullity and is not excluded from the appeal by c. 1629.

It concerns an appeal in favor of the party who considers him or herself to be injured by the judgment. The title to make an appeal belongs to one who is a party, (the defender of the bond and the promoter of justice, if they acted as such in the process, are also parties), and is considered submitted by the sentence against an unjust burden (cf. c. 1628). Those lawfully entitled to file the appeal will be, actively, the person who was

1. Cf. P. MONETA, "L'appello," in *Il Processo matrimoniale canonico*, 2nd ed. (Vatican City 1994), pp. 771–795.

injured, and, passively, the other parties who were in the first instance and who will have to be cited to the new instance as passive and necessary joint litigants if there are more than one, unless some of these want to take advantage of the opportunity to position themselves on the active side of the procedural relationship permitted by c. 1637 § 1. All have to be at least cited in the proceedings of the appeal (cf. c. 1640), since both the marriage which is being challenged, and the nullity which is claimed, constitute that *res individua* which c. 1637 § 2 mentions, about which juridic differentiated treatments are not possible.

As for the procedure, although it is only presented in a summary way, it begins by means of the act of lodging the recourse by the party who is challenging the sentence by the deadline established by c. 1630. Afterwards, it follows the formalizing of the appeal for its prosecution before the higher tribunal in the time period indicated by c. 1633. There will then follow all the procedural acts which are derived from that which is laid out in c. 1640, up to where the tribunal of the second instance may proceed to the new issuance of the sentence. Throughout the procedure, one can exhaust the possibilities of action shared by all of the appeals of the possibility that would arise in the event that a *de iure appellandi* (c. 1631) would be brought up to the point where the appeal is renounced (c. 1636) or is declared deserted (c. 1635). As in every appeal, the acts must be sent to the tribunal *ad quem* in conformity with what is prescribed in c. 1474 (cf. c. 1635).

However, in this appeal there could be a typical and special circumstance which would transform this appeal into the category of the special process. Canon 1639 § 1 prohibits, in a general way, the joinder of issues formulated in the appeal from being permitted to admit the formulation of any new allegation, the consequence of which would be the distorting or complicating of the formulation of the doubt, which has to be expressed with the greatest simplicity. This is true whether it confirms or reforms, in whole or in part, the appealed sentence. This measure of good and ordered procedural contention, however, does not rule the appeal of the sentences issued in the cases of marriage nullity. Canon 1683 permits that, in appeal, a new allegation of nullity may be formulated which was not brought up in the previous instance. From this point of view, and independently of what the whole text of c. 1683 prescribes, it can be said that every appeal of the sentence in the cases of marriage nullity is an appeal which merits being qualified as special, despite the fact that a great majority of canons which regulate it are the same ones for the ordinary contentious process, as happens in the cases of an appeal of the sentence which did not grant the nullity.

Excluding what was just indicated, it can be said that the appeal of the sentence which does not find for the nullity pertains to the sphere of the ordinary process. From the point of view of its finality, the appeal is the guarantor of the rights of the party injured by the sentence, on whose

initiative it is incumbent to disagree, by means of a challenge of the appeal of the sentence that is considered prejudicial. This guaranty is offered by the legislator through a new judgment, which can be total, about the same litigious object already resolved by the tribunal of the first instance, and without conditions, and which will be expressed in a form of a sentence by the higher tribunal in the judicial hierarchy. For this reason every appeal comes with a double effect, suspensive (c. 1638) and devolutive (cc. 1629 and 1632–1634). The finality of the appeal is to obtain from the higher tribunal a new judgment, a new sentence, to repeat what the lower court has already done, but relying beforehand on some pronouncements and juridical and factual arguments which the higher tribunal submits to its own critical examination, perfecting thus the work of the judicial undertaking. The final result of this is presented as the best way to get a fair solution.

Finally, when the tribunal decides in the same sense as the appealed sentence, it achieves the stability of the sentence which comes from the double conformity, which means that that sentence cannot be challenged directly any further (c. 1642, 1°), without prejudice, in the present case, of that which c. 1643 prescribes in connection with c. 1644.

2. *Appeal of the sentence that finds for the declaration of the nullity of the marriage*

According to whether the sentences contain the judicial declaration of the nullity of the marriage in a first instance or in a subsequent instance, c. 1682 §§1 and 2 offers different procedural norms for the appeal which are quite distinct from the common norms for an appeal in the ordinary contentious process. In these particulars lies the truly special nature that characterizes the appeal regulated in the present canon. Both appeals share a common element that radically separates them from the ordinary appeal.

II. The Common Element In Every Appeal Of Canon 1682 Is Its Automatic Lodging

This section deals with a new breed of specifics that affects the actual concept of the common procedural doctrine of the ordinary appeal. This recourse, as it was pointed out before, is a guarantee to the injured party, because of the sentence. It also engenders in this party the right to invoke the justice of the higher tribunal (c. 1628), so that, within the

adversarial procedure of the previous instance, it may return to examine and render a judgment devolutively, totally or at least partially, about the same litigious object resolved by the previous sentence (cc. 1637 and 1639). However, such a possibility of appeal always depends upon the initiative of the party who suffers the injury that resulted from the sentence, that is to say, following the language of the code, the *pars gravatam*. The juridical power accredited to the wronged party extends thus far: if this party does not give notice of his appeal within the time period prescribed by the *CIC*, or, if, having done so in due form, his or her juridical right has then expired, either because of the lack of its formalization before the higher tribunal in the time period established in c. 1633 or because no procedural act is performed later by the party (c. 1520); or if, through his having renounced his right (c. 1641, 2° - 3°), the firmness of the appealed sentence takes effect. That is to say, there is now an impossibility of a direct challenge of the sentence in question. As a consequence, the effect of an irrevocably judged case as stated in c. 1641 is then generated. In the trials for marriage nullity, this effect tends solely toward creating the effect of a formally adjudged case (see the commentaries to cc. 1641–1643).

If the possibility of an appeal stops being a right of the injured party, and the mechanism of the automatic lodging of the recourse of the appeal is activated, then this special recourse in the cases of marriage nullity is affected by a significant change. This special recourse goes from the dispositive juridical patrimony of the rights and duties of the party to the juridic patrimony of the Church in her exercise of her *potestas iudicialis*, by virtue of which the appeal is converted, not into a guarantee of justice for the litigating parties, but into a guarantee of a just outcome of the sentence for the Church herself. In a certain way, that certitude for a just outcome of the sentence forms a part of that ecclesiastical public welfare so directly contemplated in the canonical process by c. 1431 and similar canons, and which in consequence leads to the point where in addition, c. 1452 grants to the ecclesiastical judge some wide initiatives ex officio. These initiatives show that in the canonical process the supremacy of the public welfare is valued over and above particular welfare and over the protection and defense of private juridic interests.

The concept of an automatic appeal also signifies a firm choice for the primacy of material truth over the formal truth resulting from the definitive sentence. This is done in such a way that the hoped-for success of the pronouncement of the sentences will not depend so much on the elucidating force which is clarified by means of the adversarial procedure, as on the obligatory double judicial review of the object of the process that will prevail (although it may take place within the context of the procedural contradictory already established in the previous instance). It will depend as well on the double judgment of the separate judicial bodies that observe a hierarchical relationship among themselves. With this automatic system there is the hope of obtaining a formally adjudged matter, either

necessarily modeled on c. 1641, 1°, or at least, with a certain formal difference, in the norms of c. 1682 § 2, an adjudged matter very similar to the previous one. In this hypothesis, one completely prescinds from the supposed risks which can be produced from the objective truth as an exclusive consequence of a dispositive initiative of procedural rights as that initiative which cc. 1629 and 1641, 2°–3° render legitimate. In short, in the reasoning of the code, a single sentence of marriage nullity lacks any value, although all the parties are in agreement with this pronouncement and the defender of the bond has nothing to object to. Only the double conformity of the sentence of nullity is a guarantee (according to the current canonical system) that the formal truth expressed in the sentence of nullity corresponds to the material truth, independently of the possibility of making any extraordinary recourse, if there were any reason to do this, as explained in c. 1644.

It was not easy to understand this idea. *CIC*/1917 imposed upon the defender of the bond the obligation to appeal against the sentence of nullity to the higher tribunal, without being concerned with what the defender thought of the aforesaid sentence. This was an absolute obligation which was expressly established in c. 1986 *CIC*/1917 and which was repeated by *PrM*, 212 § 2.

CIC/1917 and *PrM* gave the defender of the bond the possibility of filing a new appeal (*pro sua conscientia*: *PrM*, 221 § 1) against the second confirmatory sentence of the nullity of the marriage, which has disappeared in the current Codcom. It must be pointed out that the absolute duty to appeal the first sentence on the part of the defender of the bond offered some kind of contradiction to the teaching of Pius XII in his allocution of October 2, 1944, directed to the Roman Rota.[2] On this occasion he characterized as fallacious the affirmation that the defender of the bond necessarily, in a manner "without conditions and independently of the proof or of the results of the trial," had to make a pronouncement for the *validitate matrimonii* and not *pro rei veritate*. All the actions in the canonical process, and also those that proceeded from the defender of the bond, had to be understood as subordinate to the purpose of the process. This purpose is the investigation of the truth, so that, if the defender of the bond, after a detailed and in-depth examination of the proceedings, does not have any objection against the petition of the plaintiff, he or she has the right to say so before the judge.

In the context of the cited pontifical teaching, the obligatory recourse of appeal on the part of the defender of the bond against the first sentence of marriage nullity was difficult to sustain. However, *CM*, VIII § 1 was steadfast in maintaining this absolute duty of the defender of the bond to appeal the first sentence of the marriage nullity. In a commentary

2. Cf. *AAS* 36 (1944), pp. 281ff.

on *CM*, after having analyzed this question, we held that it seemed to us "that it would have been more certain to direct an automatic recourse of the first sentence of nullity, in a way that the proper tribunal which issued it would, at the same time, send the proceedings to the higher tribunal, without a need for concessions at the initiative of any party, although it might be a public party."[3]

The respect granted the defender of the bond in his or her role as defender of the marriage bond, and the desire to assure the truth of the result by guaranteeing it with a double conformity concerning the nullity, were both shared by the competent *Coetus studiorum* with regard to the c. 347 of the *Schema* that had been presented. At the proposal of one consultor about whether the first sentence of nullity had to be submitted to a new examination, he himself responded affirmatively. When, however, the doubt was raised about whether the burden of the appeal had to be attributed to the defender of the bond, it was explained in the sense that he would proceed ex officio, with the proper tribunal sending the case to the higher instance. When both questions were submitted to a discussion, concerning the first practice there was unanimity. There was, however, a disparity of opinions when the question was raised concerning the ratification of the first sentence of nullity as to whether it always had to be by decree. A distinction was made between: *a*) an appeal against a first sentence of nullity preceded by another sentence which pronounced for its validity, in which case the ordinary process of appeal must be followed; and *b*) the appeal of a first sentence which already pronounced for the nullity, in the case of which the voting by the majority was favorable to the decree of confirmation.[4] This diversity of treatment is what we contemplate as being accepted in c. 1682, and we shall refer to it next.

III. The Appeal of the First Sentence of Nullity of Marriage After a Previous One Had Been Pronounced for Its Validity

This is the situation described in § 1 of the canon: a deadline of twenty days is established, beginning from the publication of the sentence, so that the tribunal which issued the first sentence of nullity would send all the proceedings to the tribunal of appeal. If such a sentence of

3. C. DE DIEGO-LORA, "La reforma del proceso matrimonial canónico," in *Ius Canonicum* 12 (1972), p. 154.
4. Cf. *Comm.* 11 (1979), pp. 264–267.

nullity has been appealed, this appeal is sent along with the aforesaid acts. This is what the canon says.

Some practical problems immediately come to mind. In the first place, the question arises as to whether that which is sent to the tribunal of the trial are the same original acts, or, on the contrary, conforming to the general norm, properly authenticated copies with deference to what is laid out in c. 1474 § 1. Independently of what has been arranged in the practice of each tribunal, we are of the opinion that the tribunal of the previous instance does not have to send the original acts, which must remain in their archives.

Another issue of concern is whether in establishing the new precept of a deadline of twenty days for the sending of the proceedings to the higher tribunal, the one appealing can take advantage of the stated time period or, on the contrary, whether that person must be held strictly to that deadline of fifteen working days granted by c. 1630, like any other petitioner. Perhaps this deadline of twenty days is arranged so as to include those fifteen working days, thus making both possibilities feasible. In relation to the problem that those distinct time periods of fifteen and twenty days gave rise to, García Faílde asks whether in these cases it is possible to speak accurately about the appeal. In his opinion it undoubtedly does when "some lawfully interposed appeal"[5] is attached to the dispatch of the proceedings to the higher tribunal. In our understanding, independentof the purpose, (which, of course, is to protect the interest of the plaintiff or only to guarantee the objective truth), there will always be an appeal that involves the dispatch of the proceedings to the higher tribunal, with the devolutive efficacy of a new judgment, if before the tribunal *ad quem* the adversarial procedure of the previous instance is maintained. This problem could turn out to be banal, since, once the automatic appeal is made, the parties who want to appeal remain favored in every way by the procedural choices which §§ 2 and 3 of c. 1637 offer for every appeal.

In the same line of reasoning the formalization of the appeal before the tribunal may turn out to be unnecessary. Procedural doctrine does not doubt that, when the first sentence of nullity has been pronounced in the second, or, eventually in another later instance, the applicable procedural discipline is that normally provided for in any type of appeal.[6] However, an observation at first glance at § 1 of the canon permits one to discover that in the appeal of these sentences other elements can take place which make this appeal special, and which go farther from the prescribed automatic character of the remittance of the acts to, and of, their reception by the tribunal of higher grade.

5. J.J. GARCÍA FAÍLDE, *Nuevo Derecho procesal canónico* (Salamanca 1984), p. 225.
6. Cf. P. MONETA, "L'appello," cit., p. 795.

If we go to the ordinary norms of the appeal, as c. 1691 prescribes, it is advisable to bear in mind that, together with the canons proper for judgments in general and of the ordinary contentious process, there is an obligation to complete the specific norms of the procedure relative to the status of persons and all those norms that refer to the public good. In this respect, it seems necessary that in these appeals one bear in mind that which c. 1677 presents. We think this canon also has to be applied both to what refers to the citation of the respondent and to the petitioner if there were one. This is to be done with greater reason if there is nobody to appeal the first sentence of nullity. Once this type of appeal has been executed ex officio through the judicial initiative, the need arises for a citation for all those who were parties in the preceding instance to appear before the tribunal of the previous instance, so that they may allege what they think in their own right, before the issuance of the decree of the formulation of doubts, with the consequent individualization of each allegation of nullity, even if they may be formulating the *dubia* (that is, if they are pleading various allegations of nullity), to the extent of the general formula of c. 1639. Likewise, the decree that orders the proceeding to the period of instruction, if it is considered necessary or convenient in deference to what is laid out in c. 1600 (cf. c. 1639 § 2), will require completing the requisites of c. 1677 § 4. The reason is that the observance of these time periods appears to us to be a necessary model to be followed by the tribunal of the higher instance. This tribunal must not wait for any procedural prompting from the parties, since the initial and automatic nature of the recourse is incompatible with the paralyzation of the appeal. Consequently, without a need for such incentives, the higher tribunal will have to undertake the probatory activities that they see fit and then pronounce the sentence. Thus, all during the appeal, the higher tribunal will maintain this impetus that originated through the judicial automatic system begun by this type of challenge. This will always be done independently of the existence or non-existence of apellants, as well as any other parties pushing their own initiatives. Once the proceedings have been sent from the lower tribunal to the higher one, the latter court must pronounce its sentence. Further, it must do this without allowing the expirations to take effect through a standstill of the case due to the lack of activity of the parties. This is due to the fact that the parties are not permitted to engineer a renunciation of the appeal, since this second sentence, independently of whether or not there is an apellant, will take place in every case of the first sentence of nullity, by the order itself of canon law as directed toward the judicial body.

Once the first sentence of nullity has been issued, the case of the nullity of marriage that was accepted for the first time after another sentence distinctly , necessarily had to be judged by the higher tribunal. Through this procedure, the parties have lost their power of disposition of the process, and, now that the proceedings have been sent to it by the tribunal that dictated the sentence, this tribunal must forward the procedure of

appeal to the higher tribunal. This takes place once the new sentence is dictated, which may confirm or revoke the decree. The subjection of the higher tribunal to the effect of the automatic procedural nature with which these appeals are produced, definitely serves as a guarantee of justice and its purpose is that, in its automatic nature, the material truth will be attained by the tribunal of appeal.

This is the way this type of appeal of a sentence is conceived in the current *CIC*. Perhaps it would have been desirable for the canon, in order to perfect that system of appeal, to be specific as to the necessary time to decree the citations once the proceedings of the higher tribunal are received after their dispatch from the lower tribunal. The object of this procedure would be that this first automatic procedure would not suffer interruptions that might paralyze the process of appeal. In the same way, it would be interesting if the canon had indicated a specific time limit. Canon 1453 does this in a general way, since the appeal is dependent exclusively upon the prompting of the tribunal, and such a time limit would allow for more possibilities for its observance. The product of objective justice would be taken care of in this way with speed in the procedure. Without a doubt, the time period of six months indicated by c. 1453 (for lack of any specific precept) must serve as the norm of reference for the conduct of the tribunal in the direction and thrust of this type of special appeal.

IV. Appeal of the Sentence of Marriage Nullity Issued in First Instance

CM, VIII § 1 regulated a special recourse by means of which it innovated the system of appeal in the cases of marriage nullity. This was applied to the first sentence that declared the nullity of the marriage. Now c. 1682, in its §§ 1 and 2, has established a distinct system according to the instance in which the first sentence of nullity was issued. If it is in the first instance for the appeal, § 2 of the canon applies. If it was given in a higher instance, the contents of § 1 must be followed, which are explained in the previous section. Anyway, on the formal levelalone, we do not understand what can be the differentiating reason for a sentence for nullity being issued in one instance or in another, since both are pronounced in favor of the nullity for the very first time. Any differentiation could be explained only by reason of a certain respect and, in some way, a type of recognition of the probable value a previous sentence in favor of the validity would hold.

In fact, the revoked sentence for the validity, before the resolution of the appeal against the second sentence, which was for the nullity, is presented before the tribunal of third instance with the same possibilities of

obtaining the double conformity by the third sentence as the appealed sentence of the nullity has. It is logical that the canonical system requires that the double conformity that results is produced under the same procedural form of sentence, independently of what is pronounced for the validity or for the nullity. In this way, if there are two conforming sentences, the same effect foreseen by c. 1641, 1° will take place.

The sentence that in the first instance has declared in favor of nullity already proceeds favorably, however, if it does not have any contradictions in the same process. This is what helps explain the abridgement in the process of appeal as given in § 2 of the canon. Moreover, this is grounded in the desire to attain the greater economy of time, so that the decision rendered might achieve some semblance of stability. It may be that this facilitation of the process could be equally obtained with an automatic appeal submitted according to very strict time periods in its development and with a prohibition of any other incident foreign to the simple question put forth in the appeal and focused solely in confirming or not the sentence being appealed. We should add that, if the confirmation were to proceed through the tribunal of appeal, the form of the sentence should be composed in such a way as to respect the letter of what is prescribed in c. 1641, 1°. We do not see such a hypothetical solution as inconvenient, but the *CIC* has preferred another distinct solution and to this we have to refer.

1. *Special actions for this appeal*

Not mentioned in this case is the duty to proceed to the sending of the acts of the process from the lower tribunal to the higher one of the appeal. However, there is no doubt that this second tribunal cannot examine nor judge anything if it does not receive the acts of the first instance, for these acts gather together all that has taken place and was decided upon in that instance, (or, at least, copies of the acts as c. 1474 prescribes).

According to what is also presented in § 1, there is no indicated deadline for the lower tribunal in which to send those acts. There is a word in this § 2 (*continenter*) that is used in reference to the decision of the tribunal of the second instance. This reference seems to include all the activity of this tribunal in the appeal, not only in relation to the judgment to be given, but also in relation to the goings-on in the hearings of the parties through the tribunal. It can even be said that the aforementioned word also applies to the tribunal of the first level to send the acts without any delay. If this desire for certain and immediate action was to have been directed exclusively at a proper judicial decree, it would have been better to use the term *expeditissime* so correctly used by c. 1629, 5°. But with the term *continenter*, it is affirmed that those possible activities that the tribunal must clarify in order to arrive at its final decision have to be accomplished as soon as possible, beginning from the moment in which they receive the

acts for the appeal. Giving orders to the tribunals in this way (i.e. without subjecting them to rigorous time limits of conduct) does not lack risks, because indetermination can give rise to unjustified delays. Sometimes these things happen because of the negligence of the proper tribunal in its directives, but more likely because of a deficiency or a difficulty with the proper office of the judicial notary, or hypothetically foreseeable events like the accumulation of duties before the tribunal. The word *continenter* sufficiently expresses that the legislator desires urgency in the procedure and that the decision given by the tribunal *ad quem* be known. Moreover, in case of unjustified delays or unfounded stoppages, this language also permits that opportune disciplinary measures can be adopted by the competent authority in order to achieve a better functioning of the canonical justice in the procedural area of these appeals.

The procedural actions of the tribunal of first instance have to be sent by this tribunal to the superior at once, from the very moment of the publication of the sentence, without any waste of time, since this appeal formally lacks an appealing party, in contrast to what has been laid out in the appeal of § 1.

Whether or not there is a party injured by the sentence, and who would have held the possibility to appeal, will actually be known by the higher tribunal when it fulfills the mandate of listening to the defender of the bond and the parties, if there were any.

The precept always relies on the *perpensis animadversiones* of the defender of the bond, but he has to be the defender of the tribunal of the second instance, because each defender of the bond, in so far as he is a member appointed by the bishop of the diocese of the corresponding tribunal (c. 1435), acts in the tribunal of this bishop *(tum ad universitatem causarum tum ad singulas* causas, c. 1436 § 2) for the processes treated in the aforementioned tribunal, be it in the first or in a higher instance. This means that the president of the tribunal of the second instance will immediately have to cite the defender of the bond (c. 1433) once the acts of the first instance have been received, so that he may examine the received written material and can express observations he considers just in respect to the appealed sentence, be they in favor of or against the declared nullity. This point of view has remained quite clear in *CM*, VII § 2. Based on these suppositions, then, the need for a certain negotiation is derivatively required, This would amount to a designation of deadlines which the present § 2 is not concerned to set, but which the tribunal of appeal, knowing how to harmonize the necessary conditions of information and speed, will have to determine in its decrees, thus giving directives about its procedure or about what is suitable if only because of a mere formality (c. 1617).

In the same way, the observations of the parties, if they are present at the appeal and are of a mind to make them, will have to be welcomed. This means that the tribunal of appeal will also have to summon the

parties just in case they have anything to say in favor of, or against the appealed sentence. It can happen that they have nothing to report, but if there were an actual contradictory in the first instance, such a contradictory will be probably also manifested in the second instance, and then the tribunal of appeal can examine the criticism which the injured party makes about the sentence, as well as the reasons for the support of that party who claimed the nullity. If the parties are acting through advocates, nothing prevents them from formulating those observations. It is possible that, in producing these allegations of the parties and of the defender of the bond, no problems will emerge for the tribunal of the second instance relating to questions of procedure. However, when the tribunal makes the citation of the aforesaid parties, both public and private, and offers the favorable opportunity to formulate their respective observations to them in its decree of citation, it must take opportune measures to avoid inappropriate incidental factors and delaying tactics on the part of some of the litigating subjects.

The *CIC* says nothing regarding the method of expressing these observations, whether they may be given orally during a hearing session, or in written form, expressed independently by each one of the persons cited, and in this way avoiding the delays that could originate from the written objections exchanged between the parties. In the face of a legal silence, any one of the forms chosen will be valid by reason of the fact that the tribunal will decide what it considers more suitable to accomplish the purposes proposed in c. 1682 § 1in order to win the assurance of the party and the speed of the trial.

2. *The judgment to be issued by the tribunal of appeal*

After the tribunal attentively considers the observations of the defender of the bond and of the parties (if there are any) it must issue the judgment about the appealed sentence, which can be one of confirmation, but never one of revocation.

If this process of appeal of the sentence comes with many specifics, it must be correctly qualified as being special. The summary of a trial does not consist in the simplification of the procedural forms (this will be special and rapid only when compared to the ordinary procedural forms) but a process will be qualified as summary and not plenary for qualitative reasons, when the *cognitio veri* of the object being contested within it is limited.

In an ordinary appeal, there is always the possibility of a new plenary judgment from the tribunal of appeal concerning all the points of view with which the litigious object was judged in the first instance (c. 1637). This does not take place in the appeal of § 2, since the tribunal of second instance, if it thinks that it cannot confirm the sentence, will have to abstain

from any pronouncement about the litigated object. This tribunal limits itself to declaring the admission of the case to be examined by means of the ordinary appeal. Such a limitation gives rise to the circumstance that this type of appeal, by restricting the judgment of the tribunal, merits its being classified as *summary*,[7] as opposed to the qualification of plenary. This latter judgment is characterized by the wide procedural choices that it produces. As a matter of fact, in the plenary and ordinary process of appeal the joinder of issues takes its origin with the formulation of the doubt without curtailments or conditions, whether the previous sentence is confirmed or whether, on the contrary, it is overturned in whole or in part (c. 1639 § 1). In this (summary) appeal, however, the formulation of the *dubium* can be exclusively like this, whether the sentence appealed is confirmed, or whether the case is being introduced to an examination in an ordinary appeal so that it might be judged with a broader outlook.

a) *The decree of confirmation of the appealed sentence*

The need for the decree of confirmation to have its reasons stated has already been expressly declared by the answer of the PCIDSVC on February 14, 1974[8] for the decrees of ratification pronounced in the application of the *CM*. This decree is "judicial and decisive," states García Faílde,[9] and in it the reasons or motives must be stated, under pain of nullity (cf. cc. 1617, 1622, 2°).

By its confirmation of the appealed sentence and its bearing the effect of the double conformity in a way that parallels the two conformed sentences discussed in c. 1641, 1°, it must be affirmed that it has the force of a sentence, as for certain decrees, is recognized by c. 1618. The coherence of the entire canonical system of appeal will be upheld to the degree in which the second confirmatory resolution explains the argumentations *in facto* and *in jure* according to the juridical argumentation of the sentence, although it may adopt a formal procedure that is not properly that of a sentence but of a decree. From the formal point of view, c. 1641, 1° has been changed, however, the force of the definitive sentence produced is just the same.

The moral certitude that the tribunal of second instance acquires will be forged in relation to what was alleged and proved in the first instance. The reason is that in the second instance it is not possible to accept new contributions either of facts or of law, nor even of proof, even though it might have been within the scope of c. 1600 (cf. c. 1640 § 2). However, this tribunal will also have to keep in mind the observations that were made before it, the defender of the bond of the second instance and the parties, if there were any. Therefore, the decree of confirmation requires a new

7. Cf. C. DE DIEGO-LORA, "Naturaleza y supuesto documental del proceso 'in casibus specialibus'," in *Ius Canonicum* 14 (1974), pp. 221–349.
8. Cf. *AAS* 66 (1974), p. 463.
9. Cf. J.J. GARCÍA FAÍLDE, *Nuevo Derecho procesal...*, cit., p. 247.

consideration of the question already resolved, that of the nullity brought up and declared judicially in the first instance, together with all the exigencies proper to the appeal.It is undertaken by a distinct and superior tribunal within the judicial hierarchy and with a previous hearing of the parties, and observing what was alleged and previously proved in order to arrive at proper moral certitude (c. 1608 § 2).

By means of the confirmatory decree, the sentence of nullity is corroborated and comes into force and serves as the basis for granting to the parties the status of liberty so that they can contract a new marriage according to the prescription of c. 1684 § 1. The absence of any ordinary recourse against the decree of confirmation, beginning from the moment in which the parties were notified according to the prescription of c. 1684 § 1, is the source *ipso jure* of a new juridic situation which again formalizes for them the *ius connubii.* The confirmatory decree, just as the sentence fully conforming with the first instance, will only remain exposed , as for the same litigious object, to the extraordinary event of the new proposition of the case supported by new and serious proofs or arguments, as it foresees c. 1644. The literalness of c. 1684 § 1 rectifies the omission of what the decree of confirmation in its hteralness suffers, both in c. 1644 and in c. 1641, 1°.

b) *The decree of admission for a new examination in an ordinary appeal*

As to the circumstance where the tribunal of appeal does not reach moral certitude about the nullity declared in the first instance, the limitation of the *cognitio veri* with which it can examine the litigious object obliges it to abstain from profoundly examining, in this special procedure of appeal, the litigious question. For this reason we have qualified this procedure before not only as a special process, but also as a summary process.

The decree in such a hypothesis will be limited (*continenter*) to ordering that the appeal be admitted to ordinary treatment proper to a new instance. This decree cannot be appealed because it does not have the force of a definitive sentence and will therefore be among those excluded from appeal by c. 1629, 4°. As a matter of fact, the passage to the pronouncement of a sentence with definitive force fully opens up effectively through the ordinary stage of the appeal that is admitted by the tribunal of the second instance. A certain author[10] has lamented that there was no concession to the tribunal of appeal of the faculty to seek other proof if it is foreseen that, in admitting it, it would be possible to confirm the sentence through a decree. The suggestion is valid, but such a contribution of proof by the proper tribunal would seem to be a kind of activity favoring the confirmation, and, moreover, if the tribunal would not confirm the sentence despite the aforesaid proof, the tribunal would arouse suspicion

10. Cf. ibid., p. 246.

about its impartiality at the time of its judging in the procedure of an ordinary appeal.

In our understanding, the possible objection this decree can merit resides in the fact (which happens in the case of non-confirmation), that the case in second instance, in an ordinary appeal, goes back to inspect the same procedure that it already examined and upon which it already gave an answer in the decree.

Because ofthis, it does not seem strange that García Faílde himself has expressed his opinion in favor of the opportunity by which the tribunal of appeal could have revoked, or overturned by decree, the affirmative sentence, instead of submitting the case to this new and ordinary instance. He also questions, once the ordinary process of appeal has been admitted, whether it would not have been more opportune: "Either for an authorization for that same tribunal to be kept out of the case because of a presumed preconception or for a granting to the quarrelling party the faculty to present an exception of suspicion, based on that motivation, against the tribunal."[11] We uphold a similar attitude to the work just cited. In relation to this same type of decree, such as the recourse through which *CM* turned out to be regulated, we understand that its norm VIII § 3 had cancelled out art. 218 of *PrM* which prescribed that no tribunal of the same grade can judge a marriage case already judged before. If a tribunal delivers a judgment about the matter at issue in the appeal, it is in some way judging the case of nullity submitted to its consideration. For this, we understood that the decree that does not confirm the sentence must be, although provided with motives, a judicial resolution free of every tendency to manifest the opinions or arguments contrary to the nullity, with the result that there is an immunity from every objection of a biased position acquired by the tribunal. Its motivation cannot go further than declaring that, from what is alleged and proved in the first instance, the tribunal opts for the examination of the appeal according to the ordinary process. In any other way, the suspicion of partiality could damage the appearance of justice.

Once the appeal has been admitted into the ordinary process, and once the legal actions have already been made and the tribunal of second instance has not eliminated the eventuality of another appeal, we think that, on its own initiative, the proper tribunal must institute proceedings toward the adversarial procedure that was proper and characteristic to the appeal. For this, the tribunal will have to cite the defender of the bond and the party who results in being injured by the sentence so that, once a time limit has been determined for them, they may present their respective writings in their challenge against the sentence. Whether there are

11. Ibid., p. 247; cf. also M.J. ARROBA, *Diritto processuale canonico* (Rome 1993), p. 454.

such challenges or not, the tribunal will immediately summon the party benefiting from the appealed sentence so that he may answer such challenges if there are any, or so that he may simply formulate the allegations which he thinks are favorable to the appealed sentence. Beginning with these procedural steps, the tribunal will follow the ordinary procedure of the appeal according to c. 1691.

1683 **Si in gradu appellationis novum nullitatis matrimonii caput afferatur, tribunal potest, tamquam in prima instantia, illud admittere et de eo iudicare.**

If a new ground of nullity of marriage is advanced in the appeal grade, the tribunal can admit it and give judgement on it as at first instance.

SOURCES: *PrM* 219 § 2; *SN* can. 494; SRR Nuove norme, 27 maii 1969, App. II, 1; SRR Normae, 16 ian. 1982, Alleg. I, 1 (*AAS* 74 [1982] 516)

CROSS REFERENCES: cc. 1414, 1453, 1458–1463, 1472 § 1, 1494, 1512, 5°, 1514, 1518, 1°, 1522, 1525, 1593 § 1, 1598, 1600, 1606, 1611, 1°, 1639, 1640, 1677 § 3, 1682, 1684–1685, 1691

COMMENTARY

Carmelo de Diego-Lora

1. This norm treats the trial of marriage nullity in the stage of appeal. The procedural time is not precise regarding the time when the new allegation of nullity can be adduced. Consequently, it is possible to deduce that any moment is fine as long as the tribunal is of a higher grade competent to judge the appeal and maintains its competence, and in issuing the sentence, its competence to judge about the litigious object ceases.

As a matter of fact, if the decree of ratification of the second sentence is conforming to the first by which the nullity was declared, the litigating parties may contract a new marriage when they are notified of the sentence (c. 1684). The only duties for which the judicial vicar is still responsible are some very limited actions of execution, namely, recording the annulment (c. 1685). If the second sentence is for the nullity of the marriage and the first sentence has been pronounced for the validity, once that second one was notified to the parties, the competence of the tribunal of the second instance ceases after the publication of the aforementioned sentence, reducing its activity to an automatic remitting of the acts of the process, and the appeals made against it, to the tribunal of a higher grade according to what is arranged in c. 1682 § 1. Therefore, in one or another hypothesis, the stage of appeal expires, once the sentence, or the decree of ratification, has been pronounced. Consequently, the only thing that can happen, in the rare case where it does not reach the double conformity, would be that the case would go to a new grade of appeal. It is in this third

grade, where, later on, there is offered the opportunity to plead that new ground of nullity.

2. Adducing a new ground of nullity in the grade of appeal, as the canon authorizes, is something new in the *CIC* in relation to the former code.

However, it is not new in the canonical procedural system, since an analagous precept in *PrM*, 219 had been previously introduced. It was introduced even with greater broadness in its writing, since it is considered not only the hypothesis of appeal, but also the possibility of bringing in the new ground of nullity during the litigation, and therefore in any of its instances. Canon 1683 is quite restrictive; it allows the allegation solely in the level of appeal.

Although the canon anticipates that the tribunal examining the appeal can admit the newly introduced case, *CIC* does not stop from considering a general procedural phenomenon of successive actions. However, in the canon, the only purpose of prescribing that the tribunal of the second instance will examine it as if it were a tribunal of the first instance (meaning, of course, the ability to admit a new case of nullity) is overly emphasized. The precept addresses this type of an accumulation of a new legal action for nullity. Each case of nullity is a distinct action of the nullity of marriage, as c. 1677 § 3 well upholds. The purpose of the canon is then, first not to consider the accumulation as an object of the appeal, since it was not introduced before the tribunal of the first instance, and, second, to constitute the same tribunal as the first intance tribunal for the new admitted cause.

It seems logical that, when it is permitted in the appeal process to introduce new grounds of nullity, it will be the same as that which *PrM*, 219 § 1 expressly authorized for the previous instances. It is possible then to conclude that c. 1683 is limited to the situation of an appeal simply for an accidental reason, namely, because of the very place in which it is situated in the *CIC*, after the appeal and before the proper canons determining the efficacy of the definitive sentence of nullity of marriage.

This then is the express, literal meaning of the canon. If the authorized change from the original petition due to the new ground of nullity arises in the instance of appeal, the tribunal will examine the new cause as if it were of the first instance (in this way each *causa petendi* will have the hierarchical judicial grade in which it is admitted). Of course it is better for the process if the new cause of nullity is put forward later in the first instance. For here the same tribunal follows the procedural steps, while keeping in mind the change of the petition. If such an accumulation, on the contrary, happens during the instance of appeal, then the change of the petition receives an *ex novo* assignment of competence by reason of connection (c. 1414). Because the new cause is introduced for the first

time before the tribunal, the assignment of competence fits the lower hierarchical order.

3. Due to the general capacity which the process of marriage nullity holds to assume new actions of nullity adduced later on, it is possible to accept as proper the reasons which are customarily given through the procedural doctrine to justify c. 1683, even though it appears so closely connected to the appeal alone. By way of example, we cite the following opinions: "This possibility constitutes an exception to the general principle established in c. 1639, and this because of the special nature of marriage cases and because of the desire of the Church to seek justice and truth. Frequently it happens that nullity has been denied because of the ground which was invoked at the beginning. But during the process sufficient elements have appeared that indicates that it can be resolved through another ground."[1] Acebal, in his commentary on c. 1639, had already indicated that they made an exception for the cases of marriage nullity from this norm, and added: "Not only for reasons of procedural economy, but, above all, because of the nature of these cases and the connection existing between the titles or grounds of nullity."[2]

But the previous justifiable arguments are valid both for the appeal and for the first instance. It happens in the later situation with even greater reason, because it distorts the orderliness of the process less, in not requiring the need to attribute to the same tribunal the judicial competencies of a different level. Because of this, in one of the early commentaries to the *CIC*, referring to the change of petition through the introduction of a new ground of nullity according to c. 1683, a certain author maintained: "it must be understood that, although the canon says nothing expressly, the introduction of a new *caput nullitatis* in the first instance is possible."[3] We maintained that, in relationship with c. 1639, the sole exception to c. 1683, "is based on the specific nature of marriage nullity cases, the judgment of which are found in the exceptional situation resulting from c. 1643."[4]

In our judgment, insisting on what was previously affirmed, both in the appeal and in the first instance such a change of petition, as the Spanish procedural doctrine would call this phenomenon, is permitted by means of the introduction of a new ground of nullity. Or it may be of various grounds, since c. 1683 does not limit its number, in its use of the terms *novum nullitatis matrimonii* in an indeterminate way. This is done fundamentally through the canonical conception of the *res iudicata* when applied to the cases of marriage nullity. The love for justice and truth, united

1. J. MARTÍNEZ VALLS, commentary on c. 1683, in *Código de Derecho Canónico* (Valencia 1993), p. 725.
2. J.L. ACEBAL, commentary on c. 1639, in *CIC Salamanca.*
3. L. MADERO, commentary on c. 1683, in *CIC Pamplona.*
4. C. DE DIEGO-LORA, commentary on c. 1639, in *CIC Pamplona.*

to the forum of connection (c. 1414), give a double support, moral and juridical respectively, to the successive accumulation of legal actions. The concept of an adjudged matter that follows these kind of sentences, by virtue of c. 1643 (inherited from c. 1903 *CIC*/1917 and from a previous canonical tradition one cannot disregard) explains that the principle *lite pendente nihil innovetur* of c. 1512, 5° does not govern the special trial of marriage nullity.

Consequently, the definition of the terms of the controversy, after the *litiscontestatio*, does not have to abide by the demands of c. 1514 in order to be validly modified.It must be observed, however, that this precept did not pass on to c. 1677, the re-writing of which does not make clear how the procedural relationship prevents the bringing in of new *capita nullitatis*. Thus what was just said with the express permission of c. 1683 is confirmed, which does not present any other line of resistance in order to adduce the new ground of nullity other than that of the instance with respect to the case of nullity where it is proposed for the first time. In this case, the precept is forced to declare itself in favor of the competence of the appeal tribunal, even though there may be a judgment of the aforesaid ground in the first instance. Thus there is a flexibility in the special process allowing it to take care of the new actions of marriage nullity which can arise among the same parties during the trial as long as it does not reach the firm sentence.

In our judgment, finally, c. 1683, more than being an exception to c. 1639, is a special procedure for marriage nullity as compared with the ordinary procedure. The latter remains regulated, after the *litiscontestatio*, under the *rigor* of cc. 1512,5° and 1514 for any change of petition. In marriage nullity procedures, on the contrary, one finds the open possibility for change, not prevented by c. 1677 and expressly permitted, up to the stage of the appeal, with a special and distinct allowance for functional competence through c. 1683. Despite the introduction of a new ground of nullity into the appeal, the formula of the doubts in the second instance keeps following that of c. 1639 § 1, which remains unchangeable, meaning, if the previous sentence is confirmed or is reformed in whole or in part. On the level of appeal, a new ground of nullity being admitted does not affect the *litiscontestatio* of the appeal itself, but only its procedure, since a new procedural route in first instance then begins concomitantly for a tribunal which, though being a tribunal of appeal at the moment of admitting the new ground, will be the tribunal of first instance in order to examine and to judge it in regard to the new procedural object.

The tribunal, being competent in the second instance to assume in the same process a case of nullity that it has to examine and judge in the first instance, must pronounce those directive decrees which make the trial possible without confusion. It further must make well known the accumulation of succesive legal actions and, in the acts themselves, the process of the double level of competencies in which it exercises its

jurisdictional power. The *CIC* illustrates nothing of this duty, especially in cc. 1458–1464, which treat the order which must rule in the examination of the cases.

This double level of competencies, attributed to the same tribunal in a concrete process of an appeal, is completely incompatible with the strict terms that permit the summary process of appeal as regulated by c. 1682. This tribunal cannot come to any resolution regarding any cause of nullity that has not been incorporated within the appealed sentence that expects only its ratification at the tribunal of appeal or its admission by this tribunal for a new instance of appeal according to the ordinary rules of the marriage trial (see commentary on c. 1682). If the decree of the tribunal of appeal has given a pronouncement for this new examination in the ordinary instance of appeal, at that time it will be possible to adduce the new case of nullity. On the contrary, while it is in the process of summary appeal of c. 1682 § 2, the parties lack any powers to initiate anything not granted them by the tribunal so that the sentence may be ratified, or, on the contrary, so that it can be precluded in favor of the process of the ordinary appeal.

4. If a new ground for nullity is brought forward while still in the first instance of the trial, the assumption of the new ground will offer few difficulties, above all if the addition of the new legal action is brought out during the period of charges and counter-charges, and even during the period for the examination of the proofs. Moreover, certain criteria can be found in the canons, as, for example, c. 1593 § 1, which, although foreseen for a procedural situation that is quite different, explains solutions of procedure for which we see no difficulty in that they can be analogically applied to our hypothesis. If the cause of nullity is presented later on, yet was introduced in the final periods of the trial, it would be advisable to halt the trial according to what is prescribed in c. 1518, 1°. That which is fundamental is that the tribunal should cite the respondent anew plus the defender of the bond for the effects of c. 1677.

On the contrary, if the cause of nullity was introduced later on by the respondent, the tribunal of the first instance will try to adjust the following procedures to the admission, with whatever is possible, to the proper exigencies of the counterclaim. Let us not forget that the institute of connection is the title which justifies the counterclaim (c. 1494), and that the criteria which c. 1463 offers for the counterclaim to be set up within the legal time frame, will be able to serve the tribunal as the criteria for the direction and arrangement of the process in the new case of nullity put forward by the respondent, in a way that all those actions, in the measure in which it is possible, can have a single treatment. It is fundamental to understand that the opportunity to propose and to exhibit the specific proof that the case of nullity requires and that has been adduced later on is offered to the parties. In the same way, one has to manage it so that the sentence that is to be issued in the trial is the same unitary formal space

where the judge responds to all the doubts formulated in the trial (c. 1611, 1°). Thus the different appeals will be put together in the same way, from the viewpoint of procedure, beginning with that of the appeal, be it total or partial, which they possibly made against the sentence.

5. In our opinion, however, the difficulties will make their presence felt in greater measure when the new ground of nullity is introduced in the appeal, such as anticipated in c. 1683. The double competence with which the tribunal acts in one or other grounds of nullity has to deploy special concerns so that, using the due attention to the causes of nullity which have already been brought out in the appeal, it can in its turn set up the new contradictory of the first instance in conformity with c. 1677. Next the tribunal will indicate the time period for the resulting period of proof in relation to the ground that was brought up later on. Afterwards it can follow the norms of procedure of cc. 1598–1606 up to the point of issuing the sentence of the first instance. The broadness with which these cc. 1640 and 1691 are conceived permits the judicial body to respect the rules of procedure at the same time that it manages the initiatives which are always to permit the preservation of the procedural contradictory and the rights of the parties in relation to the newly introduced ground.

It can be that in a certain case it will not be necessary to bring up proof for the nullity as worded in the appeal, because this new ground has already been demonstrated in the previous instance. In conformity with the principle of acquisition of proof, the tribunal can use the said proof in order to come to a resolution in favor of the newly adduced ground of nullity. It is suitable to keep in mind the distinction of c. 1472 § 1 between acts of the process and acts which are referred to the substance of the litigation. The former are exhausted in the actual process in which they were performed. But, the acts referring to the substance of the litigation beyond the process itself in which they are produced, as well as what cc. 1522 and 1525 make obvious. For that effect, those proofs examined in the preceding instance can be probatory instruments already examined in the previous instance so that they may favor the newly introduced ground of nullity.

In every case, the new cause of nullity will have to be submitted to a proper period of instruction, which means that it will be suitable for the reception of new proofs in the trial which is being prosecuted in the grade of appeal. In it one will weigh and show the specific necessary proof, immediately following the procedures of publication, the conclusion in the case, just as that of the final defenses, if the parties do not make a specific renunciation of them (c. 1606).

Finally, the sentence of the first instance, for the new case of nullity presented at a later time, must be distinct from that of the appeal, although they may be given on the same date. One sentence cannot and must not assume the pronouncements or the arguments of another one. The double character and the distinction of levels in which the decisions

are pronounced by the same tribunal, distinguishing those that were the reason for nullity in the appeal and those that had been the reason in the first instance, prevent a single treatment, in one sentence alone, with a variety of decisions. Both sentences are fulfilling distinct procedural purposes specific for each one, and both are to be subject to a distinct set of recourses, especially in what refers to the appeal, which does not permit the sentences to be combined. The appeal ends with the sentence which resolves the doubt according to c. 1639 § 2, and to this there will be added the sentence issued in the first instance as the final result within the cause of nullity (for procedural unity). The procedural phenomena are atypical, but they are consequences derived from a canonical precept which may be overturned in favor of a possible solution of justice, without other delays, although it may be violating the strict purity of a procedural system ruled only by logical formal laws.

1684 **§ 1. Postquam sententia, quae matrimonii nullitatem primum declaraverit, in gradu appellationis confirmata est vel decreto vel altera sententia, ii, quorum matrimonium declaratum est nullum, possunt novas nuptias contrahere statim ac decretum vel altera sententia ipsis notificata est, nisi vetito ipsi sententiae aut decreto apposito vel ab Ordinario loci statuto id prohibeatur.**

§ 2. Praescripta can. 1644 servanda sunt, etiam si sententia, quae matrimonii nullitatem declaraverit, non altera sententia sed decreto confirmata sit.

§ 1. After the judgement which first declared the nullity of the marriage has been confirmed on appeal, either by decree or by another judgement, those whose marriage has been declared invalid may contract a new marriage as soon as the decree or the second judgement has been notified to them, unless there is a prohibition of this appended to the judgement or decree itself, or imposed by the local Ordinary.

§ 2. The provisions of can. 1644 are to be observed even if the judgement which declared the nullity of the marriage is confirmed not by a second judgement, but by a decree.

SOURCES: § 1: c. 1987; *PrM* 220; *SN* can. 495; *CM* VIII § 3; *CMat* VIII § 3

CROSS REFERENCES: cc. 535, 1071, 1075, 1077, 1121–1223, 1611, 4°, 1641, 1°, 1642–1644, 1650–1655, 1672, 1682, 1689

COMMENTARY

Carmelo de Diego-Lora

1. Every definitive sentence of marriage nullity that produces the formal judged case, according to what is laid out in c. 1641, 1°, produces a certain effect of the material judged matter, despite the literalness of c. 1643. Not only in the future will it not be possible for it to be challenged directly because it enjoys the firmness of the law in accordance with c. 1642 § 1, but it becomes a law between the parties and gives place to the exception of the adjudged matter, in conformity with c. 1642 § 2. Yet it comes with the limitations that proceed from what can give rise to new and serious proofs or reasons against the declared nullity, and a new proposition of the case is set up in accordance with c. 1644 § 1. While this proposition of the case may not succeed (c. 1644 § 2 in principle does not

allow the suspensive effect to this *nova proposito*), the double sentence in favor of nullity, or the first sentence of nullity ratified in appeal by a motivated decree, is law for the parties.

The confirmed or ratified nullity of the canonical marriage is for the litigating parties a law of liberty to contract a future marriage. Those beforehand who socially and ecclesially had the juridical condition of spouses, now, due to the definitive judicial declaration of nullity, acquire the certainty of their true juridic status, meaning, they are free from what was only an apparent conjugal bond and then free to contract, as the canon says, *novas nuptias*. The precedent is in c. 1987 *CIC*/1917, although, during the time when the old codal system was in use, there was the possibility of a new recourse of appeal, *pro sua conscientia* on the part of the defender of the bond, against the second sentence of nullity, that *ius* to contract a new marriage did not come into existence until ten days from the notification of the sentence without such a recourse being lodged.

Such a *status libertatis* gives the ability to contract a new marriage to anyone who did have the status of a spouse. Now this new status arises in them through the very stability of the canonical sentence of marriage nullity. However, the canon requires the juridical power to contract, what we can qualify as the effective exercise of the *ius connubii*, with the fact of the notification to each party of the second sentence conformed with the nullity declared previously, or of the decree of ratification issued by the tribunal of second instance. This moment of notification is the precise time when the spouse acquires the true recognition of his current juridical status according to the formal recognition of the nullity that the competent body of judicial power of the Church rendered.

Henceforth a direct challenge against the judicially declared nullity will not be possible. This can only happen when there emerges the eventuality of a new proposition of the case, if there appear to be new and serious reasons or proofs. Meanwhile, when there does not exist any direct appeal against the confirmatory second judicial resolution or decree of ratification, the judicially declared nullity for the marriage publicly announces the freedom to contract for those who were previously bound within the sphere of juridic appearances. The decree having been issued, they now find themselves free from all juridic constraint.

2. At times, the canonical scholars try to apply the characteristic criteria of the execution of sentence to the firm sentences of marriage nullity, even using the term "execution," as cc. 1650-1655 provide for the execution of the sentence. In our opinion, it is a task of useless force for the simple reason that the sentence which declares the nullity of the canonical marriage is a sentence that is merely declarative, and these pronouncements are never, in themselves, capable of being submitted to any execution, such as is regulated in the canons indicated above.

The execution of the sentence implies pronouncements that engender duties for the one judicially held responsible, such as the duties of giving, of doing something, of abstaining. These are duties from which obligated behaviors are derived, and which are either faced voluntarily or in a subsidiary manner. Those responsible can carry such duties out within a period of forced execution, be it mandated by one's own judicial body, or, as in the canonical system, through a mandate of the diocesan bishop (c. 1653 § 1), according to a decree which opens the way to its execution, a decree pertaining to the judge or the tribunal which issued the sentence (c. 1651).

When the canonical doctrine mentions the execution of the sentence of marriage nullity it tries to accomplish some practical solution in the field of the execution of the sentence of nullity. In reality, however, what it customarily refers to are themes which do not properly pertain to the execution itself of the declared nullity, such as those that refer to the judicial costs (c. 1611, 4°) or those that refer to the merely civil effects which can be derived from the declared nullity, but which are proper to the competence of the civil judges (c. 1672). It may refer also to the study of the efficacy of the canonical sentences of nullity in the civil order, as happens in Spain as a consequence of art. VI/2 of the Agreement on Juridical Affairs, of January 3, 1979, signed by the Holy See and the government of Spain.[1] One will even be able to include here the admonitions which c. 1689 mentions in relation to the civil or moral obligations that could exist from one party toward the other and to the children in whatever refers to their support and education. But all these concerns are not to be identified or confused with the judicial declaration of nullity that is merely declarative.

The only direct effect that derives from the definitive sentence of marriage nullity is the liberty to contract a new marriage, once it can be proven in the presence of the judge or tribunal that the matrimonial bond existing before was purely external, a form without content, and was thus contrary to its appearance as a matrimonial contract celebrated *in facie Ecclesiae*. The firm judicial declaration of marriage nullity is, by its nature, non-executive, although it actually has the juridical efficacy which belongs to it.

3. Perhaps canon law could have imposed some further condition, apart from the notification of the parties as prescribed in the canon, in order to admit that the litigants are now free to contract a new marriage. An example would be to place the condition of compliance with the requirement of the marriage register in which the judicially declared nullity should be written , in accordance with the process as regulated in c. 1685.

1. Ratified by formal instrument of December 4, 1979, in *BOEE*, December 15, 1979, no. 300.

There could also be a certain exception in favor of the Concordat laws, similar, for example, to what takes place in Spain, in the way that it is to be expected that the civil register will transcribe or annotate the sentence of nullity at least marginally. In this way, a greater juridical security will be obtained for the new marriage which they are going to contract, avoiding conflicts that could arise between the juridic reality (the declaration of nullity) and the civil registered reality (the presumptive verification of the validity of the marriage already written in it).

Canon law did not follow such criteria. The decision was made for a more absolute recognition of the *ius connubii* of those who, by the definitive sentence of nullity or the decree of ratification, have recovered their liberty and the exercise of which, as a natural right, merits greater respect from the moment when the parties became aware, through the judicial notification of nullity, of that state of liberty which enables them to contract a new marriage.

Only in c. 1071, 2° is there consideration of the conflicts that can arise regarding marriages that cannot be recognized or celebrated according to civil law, requiring the permission of the local ordinary for the priest to assist at the aforesaid marriages. This situation, for example, can hypothetically occur in Spain, when in the civil register the sentence of canonical nullity has not been inscribed as yet, or the competent civil judge has been opposed to its being written, thereby causing an infraction of art. 80 of the civil Code, in addition to the norm VI/2 of the juridic agreement already cited (since this situation is of interest only in Spain, I have taken the opportunity of considering it in previous works to which I am making reference)[2].

4. Canon 1684 § 1, after declaring in a general manner the right to contract a new marriage, however, does introduce a final phrase of an exception to the principle which directs the future exercise of the *ius connubii* for those who, as spouses, were parties to the trial of marriage nullity. This is, namely, in the sentence or in the decree, there may be imposed upon one or two of the spouses the prohibition to contract a new marriage. The local ordinary can also impose such a prohibition according to the canonical norm, which takes the form of a *vetitum*.

The prohibition to contract marriage established by the local ordinary, in the judgment of García Faílde, is not a true impediment, since "only the supreme ecclesiastical authority can establish impediments properly speaking," (c. 1075). He immediately adds: "this prohibitive '*vetitum*' is not identified with the legal prohibition from celebrating the marriage, as is the prohibition of the '*vetitum*,' but it prohibits taking part in

2. C. DE DIEGO-LORA, "La eficacia en el orden civil de las resoluciones eclesiásticas en materia matrimonial," in *Ius Canonicum* 19 (1979), pp. 135–228; idem, "Nuevas consideraciones sobre la ejecución de la nulidad del matrimonio canónico y de la dispensa pontificia del matrimonio rato y no consumado," in *Ius Canonicum* 31 (1991), pp. 533–566.

the marriage without the previous permission of the local ordinary in the cases pointed out in c. 1071."[3] However, this juridic power of the local ordinary to prohibit the matrimony in a particular case and provisionally as long as the reason which justifies the prohibition perdures, upon those subjects wherever they are residing, and upon all those who in fact do live within his territory, such as is described in c. 1077 § 1. It seems to go further than the mere prohibition against the assistance of the clergy at the marriage established by c. 1071, but it is not said that what is being treated is an impediment, because only the supreme authority of the Church can add a diriment clause to this prohibition (c. 1077 § 2).

If we have dealt with these non-judicial matters, although only in general terms, it is because of the reference which c. 1684 § 1 establishes the *vetitum* of the bishop, any commentary specifically treating c. 1077 will have to answer these matters in a fuller manner. In this place what is interesting is the definitive declarative judicial resolution about the nullity, and it is in this context that the prohibition must be analyzed to contract a future marriage when this prohibition has been included in the sentence or in the decree of ratification.

5. We now will discuss a matter that was not incorporated in canon law until the editing of the present canon. Until this final legislative moment, however, it had already been in existence by way of jurisprudence. It has been mentioned that until the year 1917 there was no *vetitum* in the sentences of the tribunal of the Roman Rota, although previously *vetita* appeared in decisions of the Sacred Congregation of the Council, but always referred to cases of nullity for impotency and also, beginning with those, when dispensations from marriage ratified and not consummated were given. García López[4] has done a praiseworthy study of the *vetita* and of the acceptance of them by the Roman Rota in the years 1923–1967. The study of this author about the judicial *vetita*, published monographically within a more extensive work, serves as a guide for our exposition. The quality of the investigation described merits the reference to it, and the exposition will always be of great use to anyone desirous of broadening these explanations. We limit ourselves here to pointing out succinctly some of the aspects that offer greater interest to us.

It concerns a prohibition *ab homine* not *a jure*, whether by the sentence of nullity or by the decree of ratification. Marriage is prohibited for determined persons, by reason of a legitimate cause, either for perpetuity or for a determined time. Most would agree that one or two of the spouses would have an obstacle or a circumstance that through natural law makes a marriage null. If in the beginning this took place with persons whose marriages were declared null by reason of impotence, it has since been

3. J.J. GARCÍA FAÍLDE, *Nuevo Derecho procesal canónico* (Salamanca 1984), p. 196.

4. Cf. R. GARCÍA LÓPEZ, *Decisiones matrimoniales eclesiásticas* (Pamplona 1979), pp. 251–314.

imposed as well in cases of nullity by reason of the exclusion of the goods of marriage, because of dementia, because of simulation of consent and even because of a conditioned consent without the condition having been fulfilled.

6. The prohibition to contract a new marriage doubtless exceeds the litigious object upon which the sentence of nullity had to be pronounced, and at this point it has been discussed in doctrine whether the *vetitum* possesses an administrative or judicial character. Independently of its attribution to one or another jurisdictional power of the Church, the more general opinion is that it does not form a part of the sentence, but it does belong *ad calcem* of the decision, as an added judicial provision.

From the time that the judicially declared nullity acquires permanence, it must be inscribed in the register in which the sentence of the nullity is entered (c. 1685), which is the register of marriage and must be extended to the register for the baptized (cc. 535 and 1121–1123). The cessation of the *vetitum* can only take place when its cause is not perpetual impotence, be it physical or psychic, and when the nullity is founded on an act of the will of one or of both of the spouses. Ordinarily the procedure of incidents according to which the tribunal resolves these cases of nullity has been followed, and this judicial decision will be submitted to legitimate recourses that can be lodged against it. In this practice there is great reliance on most authors who affirm the judicial character of the *vetitum* among the subjects of nullity.

The opinion according to which the tribunal of the Roman Rota can add an invalidating clause to the marriage which would be contracted against the prohibition of the *vetitum*, while supported up until the *CIC*, today cannot be sustained, especially after the exclusive faculty was expressly reserved to the supreme authority of the Church in c. 1077 § 2. The broader reference of c. 1039 § 2 *CIC*/1917 to the Apostolic See allowed, in our opinion, a much broader interpretation.

In itself, the *vetitum* is not directed to the fundamental question resolved by the sentence, but, beginning with it, there comes about the usurping of a function of a preventive character, directed to avoid nullities of future marriages. To consent to a new marriage against the *vetitum* does not cause nullity, but illicitness. Now then, the presence of the *vetitum* in the sentence is a public and official notice, formulated by the tribunal that declared the nullity, that a future marriage contracted by the same person can suffer from the same defect of nullity which was the cause of the sentence. The same acts of the previous process will serve as an accreditative proof of the nullity of the following marriage in virtue of the principle derived from c. 1472 § 1, 1522 and 1525. And we even think that the certification of aforementioned acts and that of the sentence of nullity to which the prohibition was added, can be used as documental premises in order to proceed to the petition of nullity conformed to the special and summary trial of c. 1686. Thus, the illicity that disobeying the entails does

not remove a well-known danger, since such a transgression gives rise to a simple and evident written proof which easily, and in a short time can, give a basis for the nullity of a marriage, this time declaring so in the trial and in the subsequent sentence engineered by any of the spouses and even by the promoter of justice if the cause of nullity has been divulged (c. 1674).

7. While § 1 of the canon is chiefly important because of the directly derived effect which it prescribes, as well as the functioning *vetitum*, § 2 gives reference to quite a different scenario.

The possibility of interposing a new proposition of the same case *after* the double conformity of the sentence of marriage nullity is extended by § 2 of c. 1684 to include the nullity of marriage declared by the first sentence and confirmed on appeal by the ratifying decree. This includes bringing out new and serious proofs or reasons, in conformity with what is established in c. 1644.

Strictly speaking, one might say that this precept amounts to rectifying an omission discovered in the revision of c. 1644. This canon, so close to c. 1643 in the *CIC*, was supposed to both justify and supplement the contents of the earlier canon. For this reason, its revisers did not wish to use an expression which would seem to contradict the cited canon, even though it were perfectly true, namely, *a definitive sentence of nullity in cases about the status of persons*.

This firmness can come either from the double conformity of the sentences, or from the decree of ratification of the first sentence of marriage nullity. Canon 1684 § 1 does not explicitly use the concept of the definitive sentence. Nonetheless, twice within its own canonical precept it mentions that the declared nullity can be confirmed in the grade of appeal by the new sentence or by decree. That means that c. 1684 § 1 proclaims very evidently indeed that the nullity of marriage acquires a firmness and efficacy through the double conformity, either proceeding from the sentence or from a decree of ratification. Such a proclamation also means that the effect of the adjudged matter according to c. 1641, 1°, (which we have qualified as formal, c. 1642 § 1, and opposite the material one of cc. 1642 § 2 and 1643) is, through the double conformity, likewise found in the trials of marriage nullity and in the remaining trials. In addition to this is the peculiarity that marriage nullity in such conformity can proceed from a decree of ratification and that its efficacy is limited only by the possible demonstration of new and serious proofs and reasons contrary to the nullity already declared.

The exception to which the new proposition refers, according to what is regulated by c. 1644, is based in serious and new proofs or reasons, and demonstrates the limit of the material adjudged matter, the effect of which, as c. 1643 states, does not arise in these trials. But such an exception is specified in that canon only for the double conformity of

sentences following the antecedent of c. 1641. Meanwhile, it was forgotten that, for trials of marriage nullity, a new and special system of appeal for sentences of nullity was established in c. 1682, which permitted the firmness of the sentence of nullity to be produced by way of the decree of ratification.

If c. 1644 § 1 had been taken into account at the time of its revision, the new automatic appeal of c. 1682 § 2 would have chosen the same expressions of c. 1684 § 1, namely, sentence or decree, although the decree refers solely to the cases of marriage nullity. The fact that other trials about the status of persons do not have an appeal that is resolved by decree, does not excuse the current literalness of c. 1644 § 1, the omission of which is supposed to remedy c. 1684 § 2. If c. 1644 had used the expression *definitive sentence of nullity in cases about the status of persons*, the myth that these cases are exempt from what is laid out in cc. 1641 and 1642 about the *res iudicata* would disappear once and for all, at the same time, moreover, c. 1684 § 2 would not have had a reason to be formulated.

1685 **Statim ac sententia facta est exsecutiva, Vicarius iudicialis debet eandem notificare Ordinario loci in quo matrimonium celebratum est. Is autem curare debet ut quam primum de decreta nullitate matrimonii et de vetitis forte statutis in matrimoniorum et baptizatorum libris mentio fiat.**

As soon as the judgement is executed, the judicial Vicar must notify it to the Ordinary of the place where the marriage was celebrated. This Ordinary must ensure that a record of the decree of nullity of the marriage, and of any prohibition imposed, is as soon as possible entered in the registers of marriage and baptism.

SOURCES: c. 1988; *PrM* 224, 225; *SN* can. 496

CROSS REFERENCES: cc. 535, 1058, 1060, 1075, 1077 § 2, 1085, 1121–1123, 1418, 1426 § 2, 1540 § 1, 1644, 1650–1655, 1684, 1701 § 1, 1°–3°

COMMENTARY

Carmelo de Diego-Lora

1. The first words of the canon are surprising, since they are applied to a sentence of marriage nullity the nature of which is merely declarative: *statim ac sententia facta est exsecutiva* (see commentary on c. 1684).

The sentence of marriage nullity, when it acquires firmness by the double conformity, doubtless produces the effects derived from the judicial declaration that it pronounces, but it does not generate obligations for the parties which demand an execution according to the prescriptions of cc. 1650–1655.

It was held, following the legal text, that the tribunal "has to issue the decree of execution, pursuant to c. 1651, in the same sentence or in the decree of ratification."[1] Independent of the existence of such a practice, we maintain, on the contrary, that, as the nullity of marriage is a merely juridic declaration, (and in this respect procedural canonical doctrine shares the same view), consequently there is no need for a decree of execution. The spouses are then put into a state of liberty to contract a new marriage, as c. 1684 states. Perhaps for this reason, Acebal limits himself to holding that "the sentence is executive after the two conforming

1. L. MADERO, commentary on c. 1685, in *CIC Pamplona*.

sentences in favor of nullity and even though there is a request for a review of the case."[2]

In principle, according to what c. 1644 § 2 prescribes, formulating the new proposition of the case does not suspend the execution of the sentence unless the law were to establish another matter, or the competent tribunal of review were to consider that the new petition has a probable foundation and could cause irreparable harm if the aforesaid execution were not suspended, In the sentences of marriage nullity, however, rather than suspending their execution, it is required that the tribunal give notice to the spouses that, despite their having been notified of the double conformity in favor of nullity, it prohibits them, in virtue of c. 1644 § 2 in relation to c. 1650, from being able to contract new marriages, as long as the new propositon of the case has not been requested and admitted for treatment by the tribunal of appeal.That which is suspended is the consequent effect of the declared nullity of marriage, which consists in impeding the *ius connubii* of those who, as contractants, were parties in the juridically and conclusively resolved trial of nullity.

But neither is it the double conformity of the favorable decisions for the nullity that makes it executive, or rather, that gives rise to that situation of liberty which permits them to contract a new marriage. Nor is it required that, in compliance with what c. 1684 directs, such an effect be produced. Nor must the confirmatory sentence of the previous nullity or decree of ratification be made known to those whose marriage had been declared null. Yet, only from this moment will they be able to contract a new marriage.

The suspensive mandate, insofar as it is capable of damaging a natural right to contract marriage (c. 1058), in no way invalidates a marriage, even if it were issued in extreme circumstances of fear of irreparable damage. The spouses could contract such a marriage, notwithstanding the decree of suspension, because their status of liberty to contract marriage depends upon the double conformity of the two declarative decisions of marriage nullity duly notified.

The reason that that judicial decree does not bring nullity for the later marriage is the same reason because of which the veto judicially imposed against contracting a future marriage, recognized in c. 1684, does not make null and void the marriage contracted afterwards despite the transgression of the prohibition contained within it (see commentary on c. 1684).

The only one who can impose the *vetitum* with an added diriment clause to the prohibition is the *Suprema Ecclesiae auctoritas* (c. 1077 § 2). This is the same authority that has exclusive power to establish other impediments to matrimony (c. 1075). Consequently, there is an analogy

2. J.L. ACEBAL, commentary on c. 1685, in *CIC Salamanca*.

between the suspension of the effects of nullity as proceeding from the decree of the appeal tribunal which is known as a new proposition of the case and the *vetitum* which the tribunal, (the one originally declaring the nullity), would have instituted. This analagously corresponds to the preventive measure directed toward avoiding any null marriage in the future. In the same way, even though they move on different levels, it is analogous with other prudent measures which can be adopted. An example is that by which, in consideration of c. 1684, it is recommended to pastors that, before permitting the new marriage, they must assure themselves that the interested parties have resolved their situation before the civil law, "in order to avoid creating situations of legal bigamy," adding that in these cases "they must remember what c. 1071 § 1, 1°–3°orders, namely, asking permission of the ordinary, except for a case of necessity."[3]

2. We start from the idea established in no. 1, according to which, in a sentence which is executive, either the unappealable judgment of nullity or decree of ratification must be understood once the notification is made to those whose marriage is declared null. This moment produces the effect of nullity and frees the parties to contract a future marriage. However, this canon also causes another effect to be derived that we shall consider next.

Once made known, the sentence of nullity of marriage that acquired firmness releases the spouses from their bond and allows them to freely contract another marriage. In order to be produced, this effect does not demand any activity, whether on the part of the tribunal or on the part of the parties, so that it might be qualified as executive. The marriage declared null, however, had remained so since it has been registered in the book of marriages of the parish in which it was celebrated, It also must be annotated in the baptismal books of the parish or the parishes where the spouses received their baptism (cc. 535, 1121 and 1122).[4] Whenever the nullity of the marriage in the respective parish registers is not stated, or when it is not entered in the books of the baptized, the register will certify the existence of a marriage, and from the viewpoint of the public nature of the register, the marriage enjoys the favorable presumption assumed in c. 1060. It is true that, according to c. 1684 § 1, the definitive sentence of the nullity of marriage, or the decree of ratification in the case, once it has been notified to the litigating spouses, admits their liberty to contract anew. But it is necessary that the formal requirements stated in the register, according to their proper nature, correspond to the material truth expressed by the definitive judicial decision of nullity. Thus, in the future, they will avoid conflicts between the material truth and the formal juridical aspect, which cannot oppose one another in a juridic system of

3. J. MARTÍNEZ VALLS, commentary on c. 1684, in *Código de Derecho Canónico* (Valencia 1993), p. 725.

4. In Spain, cf. art. 5 of the Decreto General of the CBS, December 26, 1983, *BOCEE* 3 (1984), p. 101.

verifications of truth that attest to enjoying the public trust (c. 1540 § 1). In this legitimate and necessary desire that the juridical canonical system have the consequence of being coherent at every moment, the juridic reason which c. 1685 justifies is upheld.

The public attestation of the juridic condition that the baptized, for the purpose of, and in conformity with, that condition, can exercise the rights that belong to them as members of the people of God, and never ceases to be relevant to the public ecclesial order intimately related to the salvation of souls. Because of this, the Church has always had a special zeal for the public registration of the sacramental and juridic acts which have an influence upon the juridical condition of the faithful. Indeed, it carried out, prior to the time when civil society took similar initiatives on its own, a social role of order and juridic authentication very pertinent in the relationship to the state and the juridical condition of the persons.

It is possible to inquire as to whether the activity that c. 1685 directs is properly an executive activity of the sentence of the marriage nullity, contrary to what has been maintained heretofore, or whether it has a definite nature.

We previously mentioned that the right of freely contracting a future marriage,if there is no prohibitive , does not have to be understood as a consequence of an execution of a sentence. When there is the declarative sentence of nullity, the liberty to contract marriage is an immediate effect with nothing more than the definitive judicial declaration of nullity. The impediment of c. 1085 does not affect the parties, beginning with their being notified of the nullity, and therefore they have the right to contract marriage, which c. 1058 acknowledges and which is expressly sanctioned by c. 1684 § 1.

Just as the definitive sentence of nullity has a direct effect upon the *status* of those who up to this point outwardly presented themselves publicly with the juridical condition of spouses, it also has necessary a second effect on the ecclesiastical records so that these records will not give information *erga omnes* of a false reality. For this reason, in accordance with c. 1123, it must be communicated to the pastor of the place "that he make the annotation in the marriage and baptismal registers, as he has been ordered to."

Consequently, the definitive judicial decision of marriage nullity, without need for any act of execution that obliges the judge or tribunal to issue an executory decree, produces *ipso iure* two effects resulting from the mere juridic declaration of nullity. The first is, to leave the spouses free to contract a future marriage. The second is that the competent authority is to mandate the public authority to register the juridic condition of the spouses, by making the entries in the registers in conformity with the material truth of the nullity declared through the definitive judicial decision.

As for this second effect, the motive of convenience is not what governs here, but it is that of the necessity for the proper juridic system in the service of the public welfare of the Church with the purpose of making it possible for the faithful to exercise their rights in the ecclesial society according to their juridical canonical status. Additionally, here appear the demands of the proper coherence of the canonical system, which cannot tolerate any juridic breach or distortion of the truth between the results of the exercise of the *potestas iudicialis* and the formal attestations within the scope of the *potestas administrativa* as a consequence of the definitive judicial decisions. This need for those bodies of the ecclesial administration to correspond to the needs of the rights judicially defined produces a second effect in the declaration of nullity, namely, to put into the register new entries and annotations, which give public testimony to the new juridic condition of those faithful whose marriage was declared judicially null. To carry out what we can call the "juridic constitution" relative to the status of the persons, through registering something new and different upon the previous entry, is incumbent upon those proper bodies of the administration of the Church, and such a public duty arrives in receiving official recognition of what was decided judicially, the communication of which must proceed ex officio from the proper judicial body with the presumption favorable toward validity.

This necessity to publicly constitute the juridic change that was produced is not a duty that belongs to the litigating parties, obliged by the definitive decision of nullity about their marriage, but rather a public duty which the competent authority of the Church must accomplish. For she alone is charged with ensuring, in the service of the truth, that the ecclesiastical registers publicly vouch for the authentic juridic condition of the faithful, who, by reason of their reception of the sacraments, have given their consent to public registration.

3. Canon 1685 has as an immediate precedent c. 1988 *CIC*/1917, which imposes upon the local ordinary the duty of putting the new entries in the registers, in the books of baptisms and marriages, where the marriage was celebrated, stating the judicial declaration of the nullity of the marriage. *PrM*, in its arts. 224 and 225, indicated a procedure to follow. In general terms, and prescinding from some secondary aspects, it consisted in this: once the confirmatory sentence of the previous nullity has acquired firmness, the president of the tribunal had to notify the local ordinary of where the marriage was celebrated. This person immediately had the obligation of sending it to the rector of the church in whose registers the marriage was recorded, and he in turn had to annotate the declared nullity in aforesaid registers, as well as the prohibitions which might have been decreed, and if anyone of the spouses had been baptized in another parish, he had to inform the pastor (or pastors) of the place of baptism of the sentence of nullity for their corresponding annotation. Afterwards, the canon indicated the duty of notifying the proper ordinary as soon as possible of everything that had been carried out.

The *CIC*, in the present canon, has opted for having the judicial Vicar report the definitive judicial decision of nullity to the local ordinary in whose parish the marriage was celebrated. Also, the *CIC*, in this c. 1685, omits any reference to the decree of ratification of the first sentence of nullity, which produces the same effect of finality, as c. 1684 emphasizes. The local ordinary will promptly record in the book of marriages and in that of baptisms the declared nullity and the prohibitions that could have been added.

More definite norms of procedure are not described. It seems to leave all of this to the customary practice of each tribunal, or to the regulatory norms already included in *PrM*, also, local tribunals can use the judicial help in conformity with what is laid out in c. 1418, and a certain commentator even affirms: "In Spain it is customary for the judicial Vicar to do everything," adding that "he asks" of the pastors "that they return certification that verifies that they have done so and that the records agree."[5] The judicial Vicar, however, does not always act as president of the tribunal which issues the second sentence of nullity or the decree of ratification (c. 1426 § 2). In those cases, he will have to be informed by the president of the tribunal of the nullity that has been firmly declared.

Whatever the procedural steps are that they follow, one cannot omit: *a*) the communication and sending of the sentence or of the decree of ratification of the judicial Vicar to the local ordinary in which the marriage was celebrated, although it may be through the mediation of the judicial Vicar of the bishop; *b*) the order of the local ordinary to the pastors in charge of the corresponding register or registers, so that they may make the annotations in the corresponding book of marriages and baptisms; *c*) if the book of baptisms of one or both spouses is not in his jurisdiction, he will send letters to the corresponding ordinary or Ordinaries so that they may make the respective annotations as soon as possible, asking them to send notice when these are done; *d*) such measures of registration must be made with the greatest of speed; and *e*) it would be desirable to attach to the acts of the trial the notices that such annotations have been performed so that the local ordinary by himself or by means of the judicial Vicar, will send the suitable accreditations to the tribunal that confirmed or ratified the declared nullity. This last point does not come from the text of the canon, but it is a suitable measure for good procedural order.

5. J. MARTÍNEZ VALLS, commentary on c. 1685, in *Código de Derecho Canónico* (Valencia 1993), p. 726.

ART. 6
De processu documentali

ART. 6
The Documentary Process

1686 **Recepta petitione ad normam can. 1677 proposita, Vicarius iudicialis vel iudex ab ipso designatus potest, praetermissis sollemnitatibus ordinarii processus sed citatis partibus et cum interventu defensoris vinculi, matrimonii nullitatem sententia declarare, si ex documento, quod nulli contradictioni vel exceptioni sit obnoxium, certo constet de exsistentia impedimenti dirimentis vel de defectu legitimae formae, dummodo pari certitudine pateat dispensationem datam non esse, aut de defectu validi mandati procuratoris.**

On receiving a petition in accordance with can. 1677, the judicial Vicar or a judge designated by him, can omit the formalities of the ordinary process and, having summoned the parties, and with the intervention of the defender of the bond, declare the nullity of the marriage by a judgement, if from a document which is not open to any contradiction or exception there is certain proof of the existence of a diriment impediment or a defect of form, which it is equally certain has not been dispensed from, or of the lack of a valid proxy mandate.

SOURCES: c. 1990; Codcom Resp. 17, 16 oct. 1919 (*AAS* 11 [1919] 479); Codcom Resp. IV, 16 iun. 1931 (*AAS* 23 [1931] 353–354); *PrM* 226–228; Codcom Resp. I–III, 6 dec. 1943 (*AAS* 36 [1944] 94); *SN* can. 498; *CM* X, XI; Signatura Decr., 3 maii 1972; *CMat* X, XI

CROSS REFERENCES: cc. 391, 1083–1094, 1420, 1421 § 1, 1424, 1432–1434, 1504, 1505 § 2, 1509–1511, 1517, 1611, 1612, 1620, 4°, 1622, 1629, 4°, 1673–1674, 1677–1678, 1684 § 1, 1685, 1687–1688, 1691

COMMENTARY

Carmelo de Diego-Lora

1. *Nature of the documentary process*

The rigorous application of the procedural norms contained in the Constitution *Dei miseratione* of Benedict XIV recommended that, for cases of marriage nullity that presented the adduced ground as undoubtedly certain and evident, there should be a trial free from many of the formalities usually concomitant with a nullity case. For this reason, the SCHO decree of June 5, 1989 authorized the declaration of marriage nullity by means of a summary procedure when the case consisted in an authentic document or through certain arguments. The *CIC*/1917 regulated this in cc. 1990–1992 under the designation of *excluded cases*. The juridical treatment was reinforced in arts. 226–230 of *PrM*, and it underwent its last modification in *CM*, X–XIII, which extended the special procedure to cases of nullity due to a lack of canonical form or a valid mandate for the procurator. This also includes every nullity that depended on the existence of a non-dispensed diriment impediment. From being called "excluded cases", they evolved into being called *special cases*. The *CIC* completes the reform of this process, qualifying it in view of the supposed verifying document of the case of marriage nullity, which is the justifying reason.

Since the reform of the Code, we have repeatedly noted this special process of marriage nullity.[1] Attention has always been paid to the *special nature* of this process, with noticeable peculiarities in respect to the common process for marriage nullity to which cc. 1671–1684 were dedicated, and which are nothing more than specific prescriptions which are incorporated as characteristic nuances of the same ordinary contentious process. Some of those canons, such as 1681, and in substance, (not so in the formality of the double conformity), c. 1684 § 1, are also to be applied to this special process, as well as cc. 1671-1676 and 1685. The special nature of this process fundamentally rests upon the document that supports the claimed nullity. For this reason, it is known as a *documentary process*. Its specific nature entails such a procedural simplification (unlike the ordinary process) that it leads quickly to a sentence of nullity, and does not require subsequent instances to achieve firmness. Finally, the nature of the *summary process* had to be pointed out, given that the *cognitio veri*

1. Cf. C. DE DIEGO-LORA, "Naturaleza y supuesto documental del proceso 'in casibus specialibus'," in *Ius Canonicum* 14 (1974), pp. 221–349; idem, "Consideraciones sobre el proceso in casibus specialibus," in *Ius Canonicum* 21 (1981), pp. 309–383; idem, "El proceso documental del nuevo Codex Iuris Canonici," in *Ius Canonicum* 23 (1983), pp. 663–677.

about the litigated object is limited to the appreciation of the case of alleged nullity and proven by the document, since if it does not merit such an accreditation, the judge must ensure that the case follow the ordinary legal procedure for marriage nullity and abstain from resolving the object of the trial.

2. *Elements*

Canon 1686 is extensive and complex. There was a desire, when it was being drafted, to include within it all the aspects that are integrated in the documentary process, with an exclusion of those that refer to the appeal (cf. cc. 1687 and 1688). Not only did it try to embrace all the aspects of the first instance of this special summary process of marriage nullity, but it also tried to do so in a way that offers a descriptive and total vision of the process. However, because there was no order in its explanation of the integrating elements and because the text lacked punctuation marks which would emphasize the difference of each one of them, that description imposes upon the commentator the need to make a differentiated analysis of the elements of the documentary process.

In the canon, we shall distinguish *the substantial elements* of this process from *the non-substantial or procedural elements.* By substantial elements, we mean those that refer to the object of the process and to the subjects. These are the jurisdictional body, the competence, and the legitimate parties, either active or passive, in relation to the claimed object. In connection with this object, *the document* also pertains to the substance of this special process, the existence of which names the process, because such a document makes evident the case of nullity that it tries to obtain. Non-substantial elements are, however, those that refer to the development of the procedural activity. This is not the form, since the form refers to the rigor in contributing the document supporting the cause of nullity with the petition. Therefore, from this point of view, the formal requirement makes up the very substance of the process.

3. *Elements that pertain to the substance of the process*

a) *The jurisdiction and competence of the tribunal*

We analyze, in the first place, the jurisdiction and the competence of the body when the petition in conformity to c. 1677 must be presented and has to be judged. In reality, the canon says nothing about the competence, as it does about the jurisdiction. The jurisdictional power in this process is attributed primarily to the diocesan bishop, who may exercise it personally or through the judicial vicar and the judges, in conformity with the norms of the law (cf. c. 391).

The present canon has passed from the ordinary, to whom the corresponding c. 1990 *CIC*/1917 referred, to the judicial vicar mentioned in c. 1420, and to the judge designated by him. We understand that the judge must not be one of the diocesan judges appointed by the bishop in conformity with c. 1421 § 1, who do not constitute by themselves one tribunal with the bishop, but one of the adjunct judicial vicars cited by c. 1420 § 3, although designated *ad casum* by the judicial vicar. Consequently, in both cases, it will treat one judge, who can receive counsel from the assessors indicated in c. 1424. The infraction of these norms would mean that the sentence would be absolutely null, as outlined in c. 1620, 2°.The canon says nothing, however, in respect to the norms of attribution of competence. The norms to be applied are those which c. 1673 established, although option number 4° is a possibility that will appear to be difficult, because, in the process of nullity, the proof, by its documentary character, must be provided with the petition.

b) *The parties in the documentary process*

Regarding the litigating parties, the canon prescribes that the parties must be summoned with the intervention of the defender of the bond. If there is added, as for the initiative, the need for a petition in conformity to c. 1677, the petition must proceed from the subject plaintiff legitimated procedurally according to the law, who must be any of those enumerated in c. 1674 as legitimate parties to challenge the marriage. Consequently, the procedural subjects, be it on the active or on the passive side, must be the spouses, the promoter of justice if he is the one who challenges the validity of the marriage, and, always on the passive side, the defender of the bond, by order of c. 1432. It is in this sense and in this procedural role that the canon must be understood: *et cum interventu defensoris vinculi.*

If the spouses are not like plaintiffs in the process, the two will have to be cited as defendants, since the validity or nullity of the marriage is directed by the proper rules of the indivisible and jointly responsible matters (cf., by analogy, c. 1637 § 1). On the contrary, if one of them is the plaintiff, the other spouse must be cited as the defendant. If the two have been constituted into voluntary plaintiffs, joinders of the issues, the respondent will only be able to be the defender of the bond insofar as being the public procedural subject, the bearer of the public interest joined to the conjugal bond as long as the bond must be procedurally protected. All these subjects will act as procedural parties who are vested with the faculties to present arguments, to oppose, to prove whether it is necessary to confirm what is guaranteed with the petition or to oppose it and to challenge the sentence that is issued. It does not suffice to get the vote of the defender of the bond, since he has to recognize his condition as a party equal to that which the spouses or the promoter of justice possesses, if the procedural initiative depended upon him. These positions of procedural equality expressly recognized by c. 1678, are also applicable to the documentary process in a fitting way, *praetermissis sollemnitatibus.*

c) *The object of the process*

The object of the process is the declaration of the marriage nullity through a diriment impediment, defect of lawful form and the lack of a valid proxy mandate.

The causes are limited, but this does not mean that they are rare, since the concept of a diriment impediment embraces numerous hypotheses in particular (cf. cc. 1083–1094). The practical limitation of this process is fundamentally explained by the legal need that the canon requires, namely, that the cause is recorded with certitude in a document, so that no objection or exception can be opposed to it. Such a document must accompany the written petition, and this requirement *sine quo non* gives the name to the documentary process and justifies the rapidity and simplification of its procedures and the omission of other procedural formalities.

d) *A case proved documentarily*

From a certain and authentic document required for determined excluded cases by *CIC*/1917, they have proceeded to the point of simply demanding *a document in which the cause of the nullity is proved with certainty*. This certainty cannot be other than the *moral certitude* of c. 1608 §§ 1 and 2. Now, to reach such a level of certitude, with its exclusive basis in a document, it was required that it be representative of the defect which is being called upon as the cause of the nullity, in a way that the defect was certified in a convincing form.

At the same time, this document must offer certain guarantees that it is not fictitious or only made up *ad casum* by means of manipulations registered documentarily to prepare for the nullity, as would take place with documents which would certify results of expert reports procured extrajudicially or references of authorities which were worked out by means of investigations of a different nature, or acts of notaries which were set up by collecting testimonies of third parties, although they were trustworthy, since these proofs already have their ordinary course in the *CIC* to be duly used and validly valued. Such documents would be better designated as *pseudo-documents*, which use a written documentary form to shelter other types of proofs that do not have a place in the documentary process.

Therefore, there must be an authentic document representative of a reality that operates as a cause of the marriage nullity, whose author offers all the guarantees of fidelity for what he says and whose authority does not present doubts of the interposed mediations or willful deceptions.

Finally, canon 1686 demands that, for the document that is supportive of the petition, *no objection or exception can be opposed to it*. Such a requirement does not mean that the defendant spouse or the defender of the bond cannot make an objection to the document or offer an exception to it in the procedural opposing arguments. Certainly, if those observa-

tions or defects that could be demonstrated in the document were already noted by the judge who must pronounce in his acceptance of the petition, he would refuse it *in limine litis*, not allowing it to pass into the documentary process. However, once the judge calls them forward, the parties located on the passive side of the procedural relationship can make use of the legitimate defenses they have within their reach, using these as objections or as exceptions. Doubtless, in the sentence, the judge will decide whether such objections or exceptions have been conflicting because of they lack any foundation that could advance against the probative efficacy of the document. In recognizing the importance of the document, he will declare the nullity. In the contrary case, the judge will abstain from ruling upon the litigious object.

e) *Proof of the lack of dispensation*

Finally, there is also the demand that it be equally certain that *there was no dispensation issued* from the impediment or the lack of legitimate form when the cause of the alleged nullity is founded upon one of these defects. Doubtless, a lack of the dispensation cannot be proved in the same way as the existence of the defect that is the cause of the nullity, which is a reality proved in a documentary manner. More than the certainty of the document and what is documented, which could be the requirement of the previous canonical legislation and of *Causas matrimoniales*, the *CIC* refers to the moral certitude that the judge must acquire about those points. This moral certitude does not necessarily proceed in these cases of a document, but from whatever other proofs that will bring the judge to moral certitude about the lack of the dispensation, similar to that which the document produces in respect to the cause of the nullity.

4. *Elements that pertain to the requirements of procedure*

The words *praetermissis sollemnitatibus ordinarii* do not mean that the complete formal requirement has been eliminated. Rather from that which is left out, according to the literal text of the canon, it is from the collection of the activities proper to the ordinary process, i.e., the special process of marriage nullity such as is regulated by the *CIC*, with all the references to the norms of the ordinary process, as c. 1691 explains.

However, there are specific needs of the proper procedure of the documentary process:

a) *The petition*

The petition of nullity must be formalized in conformity with c. 1677, in the form of a petition that introduces a suit, so that those that they will have to consider are the requirements which c. 1504 demands for it. Although formal compliance is not required to be applied strictly to the letter of the precept, there still must be assembled in this written paper,

which contains the petition for nullity, those indispensable pieces of information from which the procedural relationship among the parties and the judge about the litigated object can be constituted. Thus, it is possible that there will be born, after the citation, that which c. 1517 designates with the word *instancia*, namely, the identifying pieces of information about the parties, the criterion for the attribution of competence, the determination of domicile of the respondent so he can be summoned, what is being asked, and the reason for asking. The lattermost requirement is accompanied with the document that serves to support the petition, insofar as it is an officially recognized proof of the cause of the alleged nullity. In this way, the reason for petition and the documentary accreditation of the petition are merged in the formulation of the petition. At the same time, one must decide whether the cause of the nullity is a diriment impediment, or whether it proceeds from a defect of legitimate form, and whether the marriage was celebrated without the rightful canonical dispensation.

b) *The summons*

Once the petition is admitted, there is the summons of the petitioner, the respondent and the defender of the bond to be present before the judge. He will then proceed to offer them not only information about the petition but also the possibilities of opposing it by formulating objections and exceptions that can affect the document representative of the case of alleged nullity, the formulation of which are in opposition to the very reason for the petition. If, for the citation, one has to abide by cc. 1509-1511, for the citation of the defender of the bond, direct notification done in the judicial secretarial office is sufficient.

A first appearance is sufficient if neither the petitioner nor the defender of the bond opposes the document. Once these subjects have appeared in court, however, they may request a new appearance to have time for reflection and study, or to formulate their opposition in the first appearance. In both cases, the day and the hour must be determined for a future appearance in which they can answer and present their opposition. It is preferable for this subsequent appearance to be scheduled at the time of the first appearance, to ensure that the judge avoids unnecessary delays. It is desirable that the allegations and proofs that can be offered in this second appearance be made in an orderly, oral and focused manner in one hearing, except when some grave reason arises that justifies the need to make a new citation for a later appearance.

c) *The adversarial procedure*

The fact that in the court appearance the objections can be marshaled against the document, and then against the petition, and that the exceptions can also be alleged, does not violate c. 1686, which requires that there cannot be any objection or exception against the document that is the basis of the petition. The characteristic of the adversarial procedure described in c. 1686 is that in the appearance before the judge, opposition

is permitted and consequently those objections and exceptions by the respondents who adopt such a position may be discussed, with the obligation in the same appearance to prove the foundations of their opposition.

After the appearance is finalized, the judge, if it is appropriate, rejects those objections and exceptions, and declares that they cannot obstruct the document, opening the way to the nullity, if the document that supports it offers moral certitude about it. If, however, the objection or the exception is reasonable, or if it causes the judge to doubt the documentary basis for the petition, he will issue a decree refraining from making a judgment about the claimed nullity and ordering that if the petitioner desires to maintain their claim the petitioner will have to follow the ordinary procedure for nullity before the competent tribunal.

This last aspect of the possible decision can be deduced from what c. 1688 lays out for the case, which is that of not confirming on appeal the sentence of nullity issued in this documentary process. It is that which has moved us to qualify this process, combined with the characteristics of the documentary and the special process, as the summary process, limited in its scope of the *cognitio veri* as submitted to the judge. Moreover, this decree of remission to the ordinary procedure of the processes of marriage nullity is not subject to appeal because of a lack of a definitive effect (cf. c. 1629, 4°), since the proper instance remains open before the competent tribunal to follow the previously mentioned procedure.

Finally, it is possible in the appearance to offer opposition with objections to the certitude that the document offers (since there can be defects which denote some manipulation or distortion of it). It is possible as well as to offer such opposition together with exceptions, both procedural (as would be the lack of the judge's competence of the judge or the lack of ability or the inadequacy of the elected procedure), like peremptory exceptions which can affect the document itself (as would be the lack of guarantees for its dispatch or its vagueness or confusion, etc., of what is certified in it). Moreover, the previously mentioned opposition might be due to a dispensation from the impediment or from the canonical form, which would require that anyone who thus states an opposition, takes upon him- or her-self the responsibility of proving their affirmations against the petition. That which is supported here insofar as the opposition of the respondent is concerned is equally applicable to the defender of the bond if he adopts this position of opposition. The vote of the defender of the bond does not suffice to forestall the threat of the nullity of the legal actions (cf. c. 1433), which would mean the same as not truly considering as a procedural party the person who intervenes in the defense of the public good as described in c. 1432. It would mean that he or she has to maintain him- or her-self as the authentic defendant with the right to oppose and to prove what is favorable in that defense, as cc. 1434 and 1678 demonstrate.

5. *The sentence of nullity and its effects*

If the judge pronounces in favor of nullity, he must formalize his declaration in the form of a sentence. Strictly speaking, one is here treating a declaration of nullity of marriage. If in the beginning there was a dispensation to obtain it, by decree of the SCHO of June 5, 1889, of the procedural formalities required by the Ap. Const. *Dei miseratione*, of Benedict XIV, it was simply because it set off for its proof a certain written heading about the case of nullity. This was not a *minor* nullity that proceeded from the sentence issued in the ordinary process. The concept of nullity does not permit differentiated quantifications by number or importance of the formalities required in one or another process. For this, anticipating certain generalized corruptions, which insinuated that it was sufficient to proceed in these cases according to a procedure which was considered administrative and which led to the declaring the nullity by means of a decree of the bishop, the answer of the CPI of December 6, 1943, categorically affirmed its judicial nature.

The sentence that the judicial vicar or the judge designated by him issued in this special process, which, due to its oral nature, was quickly accomplished, must now respond to the substantial needs, and to that of the form which cc. 1611 and 1612 require for all sentences. If it were to be exact, the measures c. 1689 prescribes for the sentence of nullity will be adopted with respect to the moral and civil obligations that could arise, and to whatever might be admissible in relation to the livelihood and education of the children.

It is certain that the words *praetermissis sollemnitatibus* will also continue to be pressing at the time of the issuance of the sentence, and that action which will lead, were it to be issued after some problem which questions its validity, to an interpretation that is more benign and less formal than the suppositions for the nullity of the sentence, assembled in c. 1620 and 1622. However, none of the constitutive elements of the letter and spirit of cc. 1611 and 1612 should be lacking in this sentence. Without a doubt, as for the definitive sentence, which is, on its own part dispositive and declaratory of the nullity, these decisions have to be accompanied by “the reasons upon which they are based.” These reasons explain the moral certitude acquired by the judge, fundamentally based on the document supportive of the petition, in the same way as the similar moral certitude, (not necessarily based on a document but on other probatory means),attained because the dispensation from the diriment impediment or from the canonical form was not granted, if any of these formal complaints have been added to the reason for the sought-after nullity.

Finally, one must emphasize that the moral certitude the judge attains using the proof based on the document gives rise to such confidence in the legislator that the sentence of nullity issued in the documentary process (ruling out the appeal of c. 1688 and contrary to what is established

in c. 1684 § 1),will produce the effects which the aforesaid canon prescribes for the firm sentence of nullity. There is no need for the confirmation in the second grade by appeal, once such an appeal has not taken place within the legal time period. In addition, ex officio, the judicial vicar will proceed to the notifications prescribed in c. 1685 for his putting this on record in the respective marriage and baptism registers.

1687 **§ 1. Adversus hanc declarationem defensor vinculi, si prudenter existimaverit vel vitia de quibus in can. 1686 vel dispensationis defectum non esse certa, appellare debet ad iudicem secundae instantiae, ad quem acta sunt transmittenda quique scripto monendus est agi de processu documentali.**

§ 2. Integrum manet parti, quae se gravatam putet, ius appellandi.

§ 1. If the defender of the bond prudently judges that the defects mentioned in can. 1686, or the lack of dispensation, are not certain, he must appeal to the judge of second instance. The acts must be sent to the appeal judge and he is to be informed in writing that it is a documentary process.

§ 2. A party who considers himself or herself injured retains the right of appeal.

SOURCES: c. 1991; *PrM* 229; *SN* can. 499; Codcom Resp. IV, 6 dec. 1943 (*AAS* 36 [1944] 94); *CM* XII; *CMat* XII

CROSS REFERENCES: cc. 1432, 1438–1439, 1441, 1457, 1619–1628, 1630 § 1, 1633, 1643–1644, 1677–1680, 1682, 1684–1686, 1691

COMMENTARY

Carmelo de Diego-Lora

1. *The appeal against a sentence issued in the documentary process*

a) *The appeal of the defender of the bond* (§ 1)

This rule reaffirms what c. 1991 *CIC*/1917 had established and what art. 229 § 1 of *PrM* and rule XII of *CM* repeated. This includes the duty of the defender of the bond to appeal the sentence if he prudently considers that the reason for the nullity, alleged and accepted by the judge in conformity with c. 1686, is uncertain, or that there was a dispensation from the impediment or from the lack of form which has served for the justification of the nullity. The defender of the bond is also called upon to appeal the sentence if he or she believes that the objections or exceptions brought against the document that supported the judicially recognized nullity were not properly evaluated by the judge in the first place.

The duty of the defender of the bond, however, to appeal the first sentence of nullity is so serious that if he or she were not to accomplish such a duty (*appellare debet* states the canon), he or she would merit penal sanctions under c. 1457 § 1.In referring, however, to the prudent estimation of the defender of the bond concerning the deficiency of the sentence, c. 1687 § 1 converts the duty he has by reason of office into one that could turn out to be only apparent, since the obligation does not rise directly from the authority of the law. On the contrary, this authority only binds insofar as it prudently considers that it has well-founded reasons to challenge the nullity that the sentence has declared. Consequently, the sanctions mentioned in c. 1457 will only be applicable if the infraction is due to the arbitrariness of the defender of the bond in not making use of a juridical power subject to his prudence.

The result is that the duty imposed by the canon would seem to be a moral imperative, since the exercise of the appeal is consigned to the prudent consideration of the defender of the bond when it seems that the judge was not warranted in declaring nullity. In our judgment, there was a desire in canon law to emphasize both the prudent consideration of the defender of the bond and the duty to appeal. That liberty to appeal against the nullity in the old exempted cases, equivalent to the present cases of c. 1686, was already in c. 1991 *CIC*/1917 and came to be a norm which openly contradicted c. 1986 of the same code, which imposed in a general way the absolute juridical duty of the defender of the bond to appeal the first sentence of nullity of marriage in every case. In pointing out, however, the liberty to appeal for the declared nullities in the special processes of nullity called *de casibus exceptis*, the logical unity of the norms of the Code about the appeal of marriage nullity becomes broken in the system itself. For this reason, the canon was edited in such a way that it protected the liberty of the defender of the bond to appeal, but it emphasized that this duty remained in force, although subjected to his or her prudently judging that the sentence of nullity merited being challenged because of the defects which c. 1991 *CIC*/1917 described.

Therefore, from an absolute and binding obligation to appeal against every nullity declared by sentence, there was a passage within *CIC*/1917 aimed at making this a relative and non-binding duty. It depended upon the prudent consideration of the defender of the bond for the nullities of marriage declared by sentence as issued in *exceptional cases*, which in 1971, beginning with *CM*, began to be called *special cases*, and, in the current *CIC, a documentary process*.

Because the duty of necessarily appealing has disappeared in the *CIC* and was replaced by the automatic appeal of c. 1682, the autonomy and the writing of the present text of c. 1687 § 1, as conceived apart from c. 1682, lack justification. In reality, the appeal of the defender of the bond could be included in the precept of c. 1687 § 2, because the defender of the bond would also be a party prejudiced by the sentence if he or she thinks

that the sentence of nullity issued in the documentary process does not respond to the exigencies of c. 1686.

In the transition from c. 1991 *CIC*/1917 to the new Code, relative to the defender of the bond's duty to appeal in every case, the 1944 address of Pius XII[1] played an important part. In this address, the Roman Pontiff made it quite clear to the Auditors of the Rota that, while the defender of the bond must defend the sacred bond of matrimony, this defense must be subordinated to the purpose of the trial, which is to attain objective truth. In this context, it is impossible to sustain an unconditional duty to appeal the first sentence if the defender of the bond understands that the sentence corresponds to the truth. Because of this, the *CIC* resolves the necessity in the special common process of the double confirmation of the nullity, for the firmness and the execution of the sentence, by way of the appeal regulated by c. 1682. That double confirmation is unnecessary when it is declared by sentence in the documentary process.

b) *The appeal of the injured party* (§ 2)

We find ourselves before a new law, without precedent in the *CIC*, with all the juridical logic derived from the contradictory nature that the documentary process possesses and from the exigency of c. 1686 from which the nullity is declared by sentence. The judicial nature of this type of process, referred in the past to the exempt cases, had already been declared by the CPI on December 6, 1943.[2] However, until the new canonical regulation, a regulation like this one had not existed, which definitely transfers to this documentary process the right to appeal, which everyone injured by a sentence party possesses (cf. c. 1628).

In leaving the appeal of the sentence of nullity to the initiative of the respondent or the defender of the bond, the fact that the automatic appeal does not rule in the documentary process is highlighted. In this way, the *CIC* takes on a greater force in the effect of the first sentence of nullity in the documentary process than those sentences that follow the rules of the common special process (cf. c. 1691 in relation to cc. 1677–1680). In the summary documentary process, if the first sentence of nullity is not appealed, it acquires firmness *without the necessity* of a sentence or decree confirming the nullity. Once the fifteen days prescribed by c. 1630 § 1 to intervene with the appeal have passed, or if, after the intervention, it does not go before the judge *ad quem* within the month established in c. 1633, the first sentence of nullity remains firm and the effects will consequently be produced which c. 1684 determines. This canon, however, mentions only the sentence of nullity once confirmed, and does not reflect the

1. PIUS XII, *Address to the Tribunal of the Roman Rota, October 2, 1944*, in *AAS* 36 (1944), pp. 281–290.
2. Cf. *AAS* 36 (1944), p. 94.

sentence issued in the documentary process. The effect will equally take place from c. 1685, the executivity of which proceeds from the firmness of the sentence.

2. *The recourse of a new proposition of the case*

It is essential to make a final reference to c. 1644, to complete the picture of the recourses against the sentence of nullity issued in the documentary process by mentioning the recourse qualified as a new proposition of the case. Although the canon speaks exclusively of *two conforming sentences* in a case about the status of persons, it is obviously referring to the entire sentence, which acquired firmness in the cases concerning the nullity of matrimony, and it is in an intimate relationship with what c. 1643 provides.[3] Consequently, c. 1684 § 2 implicitly refers to the first sentence of nullity of marriage which acquired firmness through no efforts made against the appeal, because it was abandoned at the initiative of the party, as can happen with the sentencing in the documentary process.

The new and serious reasons or proofs justify, against a very firm sentence of nullity of marriage, the new proposition of the case before the tribunal competent to receive the appeal.

3. *The complaint of nullity against the sentence of the documentary process*

It should be stressed that sentences of nullity of marriage pronounced in the documentary process are submitted to the challenge due to the complaint of nullity as regulated in tit. VIII, chap. I, of part II, section I. Through not treating cases that affect only the good of private persons, the legal remedy of the nullity according to c. 1619 is impossible. The cases of nullity will be the remediable or irremediable cases of cc. 1620 and 1622 respectively. The complaint of nullity is possible when combined with the appeal (cf. c. 1625) or as an autonomous complaint, also within the respective time periods of cc. 1621 and 1623. In the same way, this is proposed before the same judge who issued the challenged sentence of nullity in conformance with c. 1624, either at the instance of the injured party, public or private, or by the judicial initiative according to c. 1626. As for the appropriate procedure, the competent judge will follow the norms of the contentious oral process (cf. c. 1628).

3. See introduction to part II, sec. I, *De iudicio contentioso ordinario*.

1688 **Iudex alterius instantiae, cum interventu defensoris vinculi et auditis partibus, decernet eodem modo, de quo in can. 1686, utrum sententia sit confirmanda, an potius procedendum in causa sit iuxta ordinarium tramitem iuris; quo in casu eam remittit ad tribunal primae instantiae.**

The judge of second instance, with the intervention of the defender of the bond and after consulting the parties, is to decide in the same way as in can. 1686 whether the judgement is to be ratified, or whether the case should rather proceed according to the ordinary course of law, in which event he is to send the case back to the tribunal of first instance.

SOURCES: c. 1992; *PrM* 230; Codcom Resp. IV, 6 dec. 1943 (*AAS* 36 [1944] 94); *SN* can. 500; *CM* XIII; *CMat* XIII

CROSS REFERENCES: cc. 1448–1449, 1630, 1633, 1639 § 2, 1644, 1684 § 1, 1685–1687

COMMENTARY

Carmelo de Diego-Lora

This canon reproduces c. 1992 *CIC*/1917, which was repeated by art. 230 of *PrM*, and then accepted by rule XIII of *CM*.

In order to receive the appeal, the canon only mentions the judge of second instance. The identity of this judge is ordinarily determined by cc. 1438 and 1441, because the legal norm stated that the appeal will be decided in the manner indicated in c. 1686, one must conclude that there will be the judicial Vicar of the corresponding Metropolitan area or the judge designated by him. If the first sentence were issued by the judge of the Metropolitan, he will be competent for the second instance of that diocese, which, with the approbation of the Apostolic See, has been designated in a stable way in order to receive these appeals. If one is dealing with tribunals of the second instance established by the Bishops' Conference with the approbation of the Holy See, according to what is arranged in c. 1439 § 2, the Bishops' Conference or the appointed bishop (cf. c. 1439 § 2) will have to appoint the judge especially entrusted to receive and to make the decision on this sort of appeals.

Because the canon demands the presence of the defender of the bond and the hearing of the parties, and to decide "*eodem modo, de quo* in c. 1686," this documentary follows the same rules in appeal already

established for the first instance according to c. 1686. The peculiarities will proceed from its being lodged and performed before the judge *ad quem*, according to cc. 1630 and 1633 respectively. The rest of the canons proper to an appeal will also be applied (with due precautions), provided that the judge considers that they will not betray the proper spirit that animates the documentary process. In the area of proof, if a broadening of the proof examined in the first instance were to be provided in the second, the judge must admit it with the limitations that c. 1639 § 2 prescribes.

Canon 1688 makes evident the *summary* character of this process through its treatment of the pronouncement of the sentence conditioned by a specific objective, namely, declaring the nullity guaranteed by means of the document that was accompanied by the petition. Because of this, if the second sentence confirms the first, the solidity of the sentence in the context of the documentary process will be confirmed, with the subsequent effects and ability to be executed according to what is laid out in cc. 1684 § 1 and 1685. Against the aforesaid sentence, which acquired firmness from the fact of being pronounced formally and published, no other type of challenge is possible except for what depends on new and serious reasons or proofs, in a *nova causae propositio*, in accordance with what is established in c. 1644.[1]

Instead, if the judge thinks that his sentence cannot be confirmatory, he is not permitted to issue a revocation of the previous sentence and the refusal of the petition. It is within the limits to which the *cognitio veri* of the judge is reduced, where the reason for the summary nature of this process lies. In these cases, the judge will dictate a decree by which, refraining from pronouncing about the case of nullity, he will send the process to the tribunal of first instance so that it will follow before them in a new procedural context, namely, the legal ordinary procedure of the special process of marriage nullity. The sentence of the first instance then loses its entire efficacy and even the expectation of nullity which the pending appeal had conceded to it, while the decree issued in second instance will acquire a firmness *ope legis* although the canon says nothing in this respect. This decree, moreover, can be qualified equally with those of interlocutories, which, because of their lack of the force of a definitive sentence, are not susceptible to an appeal (cf. c. 1626, 4°).

1. See introduction to part II, sec. I, *De iudicio contentioso ordinario*, and commentary on c. 1687.

ART. 7
Normae generales

ART. 7
General Norms

1689 **Iudex alterius instantiae, cum interventu defensoris vinculi et auditis partibus, decernet eodem modo, de quo in can. 1686, utrum sententia sit confirmanda, an potius procedendum in causa sit iuxta ordinarium tramitem iuris; quo in casu eam remittit ad tribunal primae instantiae.**

In the judgment, the parties are to be reminded of the moral and civil obligations by which they may be bound, both toward one another and concerning the support and upbringing of their children.

SOURCES: GE 3

CROSS REFERENCES: cc. 1059, 1071 § 1, 3°, 1650, 1655 § 2, 1672

COMMENTARY

Joan Carreras

The legislator devotes the last article of chap. I, "Cases declaring nullity of marriage," to expounding upon some general norms that must be kept in mind in every process of marriage nullity. The fact that these occupy this place is indicative that they have a residual character.

Canon 1689 focuses explicitly on the purpose of the judicial function that the judges should keep in mind. In the matter of marriage, the *favor veritatis* must never be confused with the *favor matrimonii*. Where no true marriage exists, both principles are ideally coordinated, thanks to the fact that the canonical process is an instrument of justice that "is an integral part of the plan of the economy of salvation, in so far as the *salus*

animarum is the supreme law of the Church."[1] It would be a serious attack on the dignity of the person if the sentence were pronounced without the judge respecting the minimum procedural laws that assure the safeguarding of the right to defense and the right to the choice of status.[2] However, the care of the legislator does not end here, but goes on to show that it would not be pastoral for the judges to limit themselves to declare the nullity of the conjugal bond in a quasi-automatic way. The judge is also obliged to admonish the parties that, even where the conjugal bond had never existed, every type of human and spiritual relationship between the parties does not disappear, but that between them, and in relation to their children there can exist bonds both of a moral and of a juridical-civil nature.

In remembering the existence of obligations that remain and thatcan be independent although connected to the declaration of nullity of the conjugal bond, c. 1689 constitutes an example of how the paternal-filial relationship is not considered a merely civil question, which would fall outside of its competence in virtue of cc. 1059 and 1672. Thus it is for good reason that the duty to educate weigh in a different degree upon the parents, the civil society and the Church (*GE*, 3).

Among the natural and civil obligations that arise from the null matrimonial contract are those that have as a foundation the right to indemnification of the damages and injuries that the one causing the nullity has produced upon the innocent party. In this sense, adducing in its favor a certain sentence pronounced before the *CIC*, García Faílde has maintained that "if one keeps in mind the purpose aimed at in c. 1071 § 1, 3°, as in cc. 1650 and 1655 § 2, the proposition can be made that in cases like these there is no authorization in favor of the one quarreling, who is bound by some of these obligations, and in favor of the execution of the firm declarative sentence of the marriage nullity as long as the aforesaid quarreling party has not accomplished these obligations or at least he has not given sufficient guarantees that he will accomplish these obligations, in so far as is possible."[3]

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1. PAUL VI, Address to the Tribunal of the Roman Rota, January 28, 1978, in *AAS* 70 (1978), p. 182.
2. Cf. JOHN PAUL II, Address to the Tribunal of the Roman Rota, January 18, 1990, in *AAS* 82 (1990), pp. 872–877.
3. J.J. GARCÍA FAÍLDE, *Nuevo derecho procesal canónico* (Salamanca 1984), p. 180.

1690 **Causae ad matrimonii nullitatem declarandam nequeunt processu contentioso orali tractari.**

Cases for the declaration of nullity of marriage cannot be dealt with by the oral contentious process.

SOURCES: —

1691 **In ceteris quae ad rationem procedendi attinent, applicandi sunt, nisi rei natura obstet, canones de iudiciis in genere et de iudicio contentioso ordinario, servatis specialibus normis circa causas de statu personarum et causas ad bonum publicum spectantes.**

In other matters concerning the conduct of the process, the canons concerning processes in general and concerning the ordinary contentious process are to be applied, unless the nature of the case demands otherwise; the special norms concerning cases dealing with the status of persons and cases pertaining to the public good are also to be observed.

SOURCES: —

CROSS REFERENCES: cc. 1403, 1670, 1693, 1702, 1710, 1728

COMMENTARY

Joan Carreras

When establishing that cases of declaration of marriage nullity cannot be handled through the contentious oral process, the legislator is applying a logical consequence of the *favor matrimonii*. In a matter of such importance, it is logical that the greatest procedural guarantees be demanded so that all the parties, both public and private, might defend their rights on equal terms. This does not mean that the oral process does not respect the principles of hearing and of equality, principles that are essential to the process or considered juridically natural to the process.[1] What is desired is to offer the maximum of procedural guarantees, which are found in the greatest measure in the ordinary contentious trial. While in

1. Cf. A. DE LA OLIVA-M.A. FERNÁNDEZ, *Derecho procesal civil*, I (Madrid 1990), pp. 88–100.

the oral judgment, the demonstration of the proof is accomplished in the presence of the parties and their advocates and the publication of the acts is unnecessary, in the ordinary contentious process, the different phases of the trial are established in a less flexible way, among which is counted everything that follows the publication of the acts.

In prescribing that there be applied, insofar as procedure is concerned, "the canons about judgments in general and about the ordinary contentious judgment," c. 1691 indicates that the process of the declaration of the nullity of marriage must observe the characteristics of that process, preserving the peculiarities proper to the object of the litigation, which is always relative to the status of the persons and, therefore, of the public welfare.

If the characteristics of the oral form are the immediacy and the concentration of the probatory matter in only one action, those of the ordinary process are those derived from the written form. These are the order of the acts, the prevention by anticipation (preclusion) and contingency (eventuality).[2]

It is desirable that the trial for the declaration of marriage nullity be developed in such a way as to emulate the immediacy proper to the oral form. This is because the judge can better evaluate the significance of the declarations of the parties and of the witnesses if he is able to appreciate the gestures, tone of voice, and other details that can shed light upon the content of what was declared. When the written form predominates, these advantages of the oral form vanish. Nonetheless, the legislator has thought that it is more important to safeguard the guarantees offered by the written form; but this does not prevent the adoption of some elements of the principle of orality.[3]

The problem of the duration of the process is very closely related to the question of the oral or written form. In reality, the duration in time for the sentence can be problematic not only because a sentence which does not adjust itself to the rhythms of social life could stop being "just,"[4] but also because an authentic judicial process necessarily requires time for development. It could be said, then, that *justitia* does not exist where there has been only a short interval between the introduction of the case and the execution of the sentence.[5]

In canons 1690-1991, there follows the criterion adopted by the legislator in virtue of which the pattern of the trial is the ordinary contentious trial that assumes a character supplementary to other types of judgments.

2. Cf. ibid., pp. 112–113.

3. Cf. A. NICORA, *Il principio di oralità nel diritto processuale civile italiano e nel diritto processuale canonico* (Rome 1977), pp. 586–587. Cf. A. STANKIEWICZ, "Il processo contenzioso orale," in *Apollinaris* 65 (1992), pp. 563–591.

4. Cf. *Comm.* 2 (1970), p. 183; 6 (1974), p. 39; 8 (1976), p. 184.

5. Cf. Z. GROCHOLEWSKI, "Processi di nullità matrimoniale nella realtà odierna," in *Il processo matrimoniale canonico* (Vatican City 1988), p. 18.

CAPUT II
De causis separationis coniugum

CHAPTER II
Cases Concerning the Separation of Spouses

1692 **§ 1. Separatio personalis coniugum baptizatorum, nisi aliter pro locis particularibus legitime provisum sit, decerni potest Episcopi dioecesani decreto vel iudicis sententia ad normam canonum qui sequuntur.**

§ 2. Ubi decisio ecclesiastica effectus civiles non sortitur, vel si sententia civilis praevidetur non contraria iuri divino, Episcopus dioecesis commorationis coniugum poterit, perpensis peculriiabus adiunctis, licentiam concedere adeundi forum civile.

§ 3. Si causa versetur etiam circa effectus mere civiles matrimonii, satagat iudex ut, servato praescripto § 2, causa inde ab initio ad forum civile deferatur.

§ 1. Unless lawfully provided otherwise in particular places, the personal separation of baptized spouses can be decided by a decree of the diocesan Bishop or by the judgement of a judge in accordance with the following canons.

§ 2. Where the ecclesiastical decision does not produce civil effects, or if it is foreseen that there will be a civil judgement not contrary to the divine law, the Bishop of the diocese in which the spouses are living can, in the light of their particular circumstances, give them permission to approach the civil courts.

§ 3. If the case is also concerned with the merely civil effects of marriage, the judge is to endeavor, having observed the provision of § 2, to have the case brought before the civil court from the very beginning.

SOURCES: cc. 1130, 1131; Codcom Resp. III, 25 iun. 1932 (*AAS* 24 [1932] 284); *CA* 119, 120

CROSS REFERENCES: cc. 1056, 1057 § 2, 1401 § 1, 1671

COMMENTARY

Joan Carreras

The principle of the indissolubility of the conjugal bond is not exclusive to canon law, but it is justly derived from the very nature of the marriage agreement. Since we are treating a principle positively rejected in the majority of modern states which have established divorce, the Church not only has repeated that the indissolubility of marriage is not the exclusive patrimony of Christians, as though one is treating an exclusive property of the sacrament instituted by Christ, but also has demonstrated how indissolubility is necessary for the dignity of the person and of his vocation to love (*FC*, 11; *RH*, 10).

Therefore, one is treating a property of the whole authentic "community of life and conjugal love" (*GS*, 48), based on an irrevocable agreement of the spouses, in which they "give and accept themselves mutually" (c. 1057 § 2). Since the object of the surrender and of the acceptance coincides with the persons themselves of the spouses, it would be unjust that, with the passage of time, the spouses would be wanting in their faithfulness, their dedication and conjugal affection. It only makes sense to speak about the "surrender of the person" in a way in which it is understood that this is a commitment in every dimension, historic or temporal. Leaving aside the determination of the essential obligations of marriage,[1] the "works or effects of spousal love" can receive a distinct juridical and positive formalization according to specific times and places[2] but, in every case, one is treating obligations that last as long as both spouses are alive. Although this is not the place to explain the juridical foundation of the indissolubility of the marriage bond,[3] it is important to understand that the defense of indissolubility by the Church is not an undue interference in a matter in which it is not competent. It constitutes, in fact, a part of the Church's mission in the world that cannot be renounced (cf. c. 1671).

In the indissolubility of the conjugal bond, the pastoral doctrine of the Church is inspired to confront the problems derived from the matrimonial crises that take place in our day. On many occasions, these crises

1. CF. C. BURKE, "The Essential obligations of Matrimony," in *Studia Canonica* 26 (1992), pp. 379–399; J. HERVADA, "Obligaciones esenciales del matrimonio," in *Ius Canonicum* 30 (1991), pp. 59–83.

2. Cf. G. DI RENZO, "Separazione personale (storia)," in *Enciclopedia del Diritto*, XLI (Milan 1989), p. 1350–1376; A. GIUFFRÉ, "Separazione personale (dir. can.)," ibid., pp. 1403–1412.

3. Cf., in this regard, C. BURKE, "Marriage: a personalist or an institutional understanding?" in *Communio* 19 (1992), pp. 278–304; J. CARRERAS, "Il bonum coniugum, oggetto del consenso matrimoniale," in *Ius Ecclesiae* 6 (1994), pp. 117–158; F. GIL HELLIN, "El bien del matrimonio y la comunidad conyugal," in *Anthropotes* 8 (1992), p. 231–238.

are the result of the absence of an authentic matrimonial consent. In those cases, there exists the possibility for one or both spouses (cf. cc. 1674–1675) to file a petition before the competent tribunal so it may judge the nullity of the marriage.

However, in other cases, the crises of married life are not due to a defect of marriage consent. In these cases, the solution cannot be a declaration of nullity, but if sufficient causes exist, in the issuance of an act of a constitutive nature through which the ecclesiastical authority brings about a transformation of the obligatory content of the union. Therefore, one is not dealing with a divorce but with the modification of the obligations to which the spouses are bound. In trials for the declaration of nullity of marriage, one is seeking the declaration of a fact (namely, the existence of a cause of nullity), through which the resulting decision will have a *declarative* character. However, in the case of separation, we are facing decisions, judicial or administrative, of a *constitutive* character.

Since the transformation of the obligatory content of the bond is not limited to the civil effects of marriage, c. 1692 § 1 implicitly establishes that cases of personal separation of the baptized must be taken to the canonical forum, "unless lawfully provided otherwise in particular places." This has been the case, for example, in the decree of the CBI, which, in art. 55, lays out that "normally, the cases of separation between spouses are treated before the civil judicial authority, although without exception there exists the right of the faithful to approach the ecclesiastical jurisdiction when they are bound by a religious bond or when reasons of conscience require it."[4]

As can be seen in comparing c. 1692 § 1 and in the CBI, distinct positions are possible, according to each country's legislation relative to marriage and the family, as well as any concordat relationships between the nation and the Church. The last two paragraphs of c. 1692 allude to these different circumstances, which can be systematized in the following suppositions:

a) In countries that permit the anticipation that the sentence issued in this matter will not be contrary to the divine law, the spouses can solicit the permission of the bishop of their diocese of residence to go to the civil forum.

b) In the countries in which the ecclesiastical decision of personal separation of the spouses does not produce juridical-civil effects, the spouses may ask permission to go to the civil forum. In these cases, it seems that permission could be obtained even for situations where it can be foreseen that the civil sentence will be contrary to divine law.

4. *Notiziario CEI* 10 (1990), p. 276.

c) In cases in which the spouses have not asked permission to go to the civil court but went directly to the ecclesiastical court, and it is evident that the case will be about the purely civil effects of the marriage, then § 3 of c. 1692 establishes that it should be the same ecclesiastical judge who should decide that the case ought to be taken to the civil court.

To conclude, it is suitable to keep in mind that, although the case of separation can be taken up both through the judicial system and administratively, it does not mean that the former is in principle better than the other. In reality, the choice between one way or another not only depends upon the deliberation of the diocesan bishop, but also upon the sense of the petition presented through which the person asks for the separation.[5] Because one is discussing an authentic decree for jurisdictional protection, wherever the person to be rendered justice has clearly solicited for the opening of the canonical process and has refused that the matter be brought to the civil court, it seems very convenient that one follow the will of the person who is soliciting. In this sense, the case would not have to go to the civil court, despite what is arranged in c. 1692 § 3, and, within the ecclesiastical jurisdiction, it would have to follow the judicial channel. It is obvious that the reasons alleged by the petitioner must be evaluated. When there exists the *fumus boni iuris*, there is still a greater convenience in following the judicial channel, paying attention to the will of the petitioner, since this offers greater guarantees that the resolution will be respectful of the juridical-natural principles of the process, those of equality and of the hearing.

See commentaries on cc. 1693–1696 for the characteristic principles of the process of conjugal separation.

To conclude the analysis of c. 1692, it is sufficient to point out that when one follows the administrative channel, it will have to begin with a decree given a reason by the diocesan bishop. This decree is susceptible to challenge by administrative recourse regulated in cc. 1737–1739. The competent diocesan bishop will be the bishop of the spouses because of their domicile or their quasi-domicile, and the norms that the diocesan bishop has determined in his decree must be followed.[6]

5. Cf. CPI, *Reply,* June 25, 1932, in *AAS* 24 (1932), p. 284; *Comm.* 4 (1972), p. 66.
6. Cf. J.J. GARCÍA FAÍLDE, *Nuevo derecho procesal canónico* (Salamanca 1984), p. 273.

1693 **§ 1. Nisi qua pars vel promotor iustitiae processum contentiosum ordinarium petant, processus contentiosus oralis adhibeatur.**

§ 2. Si processus contentiosus ordinarius adhibitus sit et appellatio proponatur, tribunal secundi gradus ad normam can. 1682, § 2 procedat, servatis servandis.

§ 1. The oral contentious process is to be used, unless either party or the promoter of justice requests the ordinary contentious process.

§ 2. If the ordinary contentious process is used and there is an appeal, the tribunal of second instance is to proceed in accordance with can. 1682 § 2, observing what has to be observed.

SOURCES: —

CROSS REFERENCES: cc. 1643, 1682

COMMENTARY

Joan Carreras

1. *The judicial process for separation of spouses*

While in *CIC*/1917 the legislator limited himself to pointing out that separation could be handled administratively, unless the ordinary decided otherwise (officially or at the insistence of the party), in the *CIC* there is a special process for the separation of spouses. There seem to be two principal needs of justice that motivated this change:

a) The need for separation cases to be handled expeditiously. Unlike the trials for nullity, in which a declaration of certainty is sought, the "constitutive" nature of the sentence of separation demonstrates the need to apply a remedy to an embattled situation in a way that legitimately establishes the rights and duties of the parties. This is better understood if one considers that spouses frequently choose to settle their problems by means of a separation, with subsequent recourse to civil divorce. To avoid the spread of this practice, it is desirable that canonical trials regarding separation be brief.

b) The need to respect the exigencies of the person's dignity, which can occasionally demand greater procedural precautions.

For these reasons, the legislator arranged that when separation was sought, the norms for the contentious oral process should be followed, except when the parties or the promoter of justice presses for the opening of

the ordinary contentious process. This is the final arrangement in c. 1693 § 1. This differs from trials for marriage nullity, in which recourse to oral trial is prohibited. This does not mean that the eventuality of following the contentious ordinary process for a greater defense of the rights of those to be vindicated has to be passed over. In fact, "the right of the party to take more precautionary measures through the contentious ordinary trial must not be neglected."[1] It is difficult to think that the parties may be able to use this faculty only for reasons of a dilatory character. In every case, since one is dealing with delicate questions that affect the essence of the conjugal communion, it is preferable to run the risk that the case be delayed, if the rights of the one to be vindicated are sufficiently protected.

2. *The sentence and the appeal*

The sentence that puts an end to the trial of separation never becomes an adjudged matter, since it is a case relative to the status of persons (c. 1643). Where the contentious oral process has been followed, the sentence will be executory immediately. On the contrary, when the contentious ordinary process has been adopted, c. 1693 § 2 prescribes that the second instance tribunal should proceed in a similar fashion, *servatis servandis,* as is prescribed for the process of marriage nullity in c. 1682 § 2. Therefore, where the sentence of the first instance has established the separation of the spouses, the appeal tribunal (having seen the observations of the promoter of justice, and, if any, those of the parties), can either confirm the decision of the judge of the first instance by means of a decree and without delay, or admit the case to be examined by an ordinary process in the new instance.

Obviously, the appeal treated here does not correspond to the automatic appeal in a non-technical form (c. 1682 § 1), but properly and exclusively an appeal in a technical sense, as the legal action of the party. The legislator gives the second instance tribunal the opportunity to shorten the process, approving the previous resolution with a decree, or he may proceed with the ordinary process, wherever he sees that the appeal is based on sufficient legitimate motives.

1. *Comm.* 4 (1972), p. 67, no. 13.

1694 **Quod attinet ad tribunalis competentiam, serventur praescripta can. 1673.**

In matters concerning the competence of the tribunal, the provisions of can. 1673 are to be observed.

SOURCES: —

CROSS REFERENCES: cc. 1424, 1425, 1657, 1673

COMMENTARY

Joan Carreras

Competence of the tribunal

Regardless of whether the ordinary (at the request of the promoter of justice or one of the parties) or the contentious oral process is followed, there is only one judge in cases of the separation of spouses, although nothing prevents the judge from having two assessors help him or her (cf. cc. 1424, 1425, 1657).

Canon 1694 refers to the norms of competence for the tribunal that have been established for the process of nullity of the bond in c. 1673. Four forums are designated: the forum of the *contract*, the forum of the *domicile* or quasi-domicile of the *respondent*, the forum of the *domicile of the petitioner*, and the forum of the place *where they must gather the greater part of the proofs*

Apart from the general considerations that can be made about the forums of competence (see commentary on c. 1673), it is interesting to point out that, in cases of separation, the fourth forum can be very useful. Since there is no determination of the validity of the bond, the place of contract does not seem to hold the importance that one reasonably attributes to it in cases of nullity of marriage. For this reason, on many occasions the most convenient forum will be the place in which the marriage suffered the problems that motivate the request for separation. It is also the place where there are witnesses who can declare something about the marriage. Therefore, in conjunction with any of the other forums, one will have to consider that judge to be competent of the *forum ultimae commorationis non precariae coniugum*, the tribunal of the place where the spouses reside.[2]

2. *Comm.* 4 (1972), p. 68, no. 14.

1695 **Iudex, antequam causam acceptet et quotiescumque spem boni exitus perspicit, pastoralia media adhibeat, ut coniuges concilientur et ad coniugalem convictum restaurandum inducantur.**

Before he accepts the case, and whenever there appears to be hope of success, the judge is to use pastoral means to induce the spouses to be reconciled and to resume their conjugal life.

SOURCES: —

CROSS REFERENCES: cc. 1152, 1155, 1676

COMMENTARY

Joan Carreras

A mainly pastoral norm

Canon 1695 establishes a norm directed at the judge, who, before accepting a case of separation, must perform pastoral measures to persuade the spouses to reestablish their conjugal partnership. The application of this norm, also present in the process of marriage nullity (c. 1676), requires the "prudent evaluation" of the judge, who must utilize this option only in cases in which he has hope of success.

Thus, this is a mainly pastoral norm, since *some* hope of success can always exist, even if it is remote. Think of how the legislator also recommends that the innocent party not refuse to pardon an adulterous partner (c. 1152) but, even after the separation, to admit that person once again into the conjugal life (c. 1155). It is not sufficient to recognize that the law can legitimate the conjugal separation in some cases, it is important to remember that pardon is demanded not only because of Christian charity, but also because of the nuptial agreement. In this sense, the judge of the separation will accomplish the norm of c. 1695 exactly when, before accepting the case, he establishes a dialogue with the parties, whether together or separately. Only then can the judge adequately weigh what hopes there are of success and which definite pastoral measures can be implemented to effect reconciliation.

1696 Causae de coniugum separatione ad publicum quoque bonum spectant; ideoque iis interesse semper debet promotor iustitiae, ad normam can. 1433.

Cases of separation of spouses also concern the public good; the promotor of justice must, therefore, always intervene, in accordance with can. 1433.

SOURCES: —

CROSS REFERENCES: cc. 1433, 1715

COMMENTARY

Joan Carreras

The public character relating to the family of the cases of separation

Since we are considering a situation of family law, our interest is not only the parties but also the public welfare, whether it be civil society, of which the family is the fundamental building block, or the Church itself, insofar as the family is also the *ecclesia domestica*. If only for this reason, it is obvious that reconciliation has nothing to do with the "judicial transaction" or other forms of terminating litigation (c. 1715). Instead, it seeks to renew the conjugal life that was threatened or destroyed. The public character is not exclusively reserved for cases of marriage nullity, and therefore, c. 1696 not only emphasizes that cases of separation enjoy a public character, but also establishes that the promoter of justice must always intervene in these cases. The observation of this duty on the part of the promoter of justice presents important procedural consequences.

In view of c. 1433, to which c. 1696 explicitly refers, the fact that the promoter of justice has not been summoned brings about the nullity of the acts, except when he has nevertheless been present, or somehow could have accomplished his mission before the sentence by an examination of the acts.

It is proper to state that the function of the promoter of justice is not the defense of the matrimonial bond, the existence of which is not questioned here (thus justifying the absence of the defender of the bond).[1] For

1. Cf. *Comm.* 11 (1979), p. 274.

this reason, while it would be improper for the defender of the bond to seek reasons for which the conjugal bond could be null, there is nothing strange in the idea that the promoter of justice can favor separation as the only suitable remedy to resolve the conjugal conflict. The promoter of justice, in reality, *curare debet ne absque causa consortia matrimonialia distrahantur, neve legitimae separationis causae haud reconoscantur.*[1]

1. *Comm.* 4 (1972), p. 68, no. 15.

CAPUT III
De processu ad dispensationem super matrimonio rato et non consummato

CHAPTER III
The Process for the Dispensation from a Ratified and Non-Consummated Marriage

1697 **Soli coniuges, vel alteruter, quamvis altero invito, ius habent petendi gratiam dispensationis super matrimonio rato et non consummato.**

The spouses alone, or indeed one of them even if the other is unwilling, have the right to seek the favor of a dispensation from a ratified and non-consummated marriage.

SOURCES: cc. 1119, 1973; SCDS Regulae, 7 maii 1923, art. 5 § 1 (*AAS* 15 [1923] 393); SCEC Instr. *Quo facilius*, 10 iun. 1935, 1 (*AAS* 27 [1935] 334); *CA* 108; *SN* can. 480; SCEC Instr. *Instructionem quo*, 13 iul. 1953, 2; SCDS Instr. *Dispensationis matrimonii*, 7 mar. 1972, Ib (*AAS* 64 [1972] 246)

CROSS REFERENCES: cc. 1056, 1061, 1674

COMMENTARY

Joan Carreras

1. *The dispensation from a ratified, non-consummated marriage: historical anthropological and theological foundations*

The dispensation from a ratified, non-consummated marriage can only be understood if one considers the historical, anthropological and theological presuppositions that serve as its foundation. The same terminology used and defined by the legislator in c. 1061 openly admits that "ratified" and "consummated" are concepts essentially related to marriage

contracted between the baptized (marriage-sacrament), although there also exist reasons of an anthropological character to recommend and justify the existence of this juridical institute so peculiar to, and characteristic of, canon law.

Although the spouses are joined from the moment of the conjugal pact, insofar as the two give and accept themselves reciprocally (*GS*, 48), the canonical tradition has joined the biblical concept of "one flesh" to the effective completion of conjugal intercourse. For this reason, medieval theologians understood that the principle of indissolubility is not absolute but can encounter some exceptions, among which is the resolution of the ratified marriage, contracted in the *pactio coniugalis*, and still is not consummated by conjugal intercourse. The full *coniunctio* of the spouses was not considered irrevocable until the spouses accomplished conjugal intercourse. Among other reasons for this practice, the structure of ancient society must be considered, at least until the Decree of Gratian in 1140, which found its support in the system of family alliances. Many times, in the conjugal pact, the spouses did not play an active role, but their parents or other relatives did so. The consent of the spouses was frequently manifested in the moment of their meeting or their carnal knowledge. For this reason, it was difficult to attribute an irrevocable efficacy to the *fides pactionis.*[1] Beginning, however, with the first conjugal intercourse, in which the spouses personally manifested their love, it was understood that the bond was definitively indissoluble.

To these historical-anthropological reasons,[2] the theological connection in the sacramental order was added. It was decided that indissolubility came into full force beginning with the redemption effected by Christ, despite the fact that its roots were already deep in God's plan *ab initio.* Thus, the gradual structure of marriage such as lived in the ancient world also shed light on the symbolic and sacramental domain. The conjugal pact of the baptized signified the union of Christ and the Church by means of the grace of God. The union of the spouses in the conjugal act symbolized the union of Christ and the Church by means of the Incarnation of the Word. Thus, in the same way that this last union is irrevocable, the indissolubility of the conjugal bond is predicated in an absolute sense only of that union which, having begun in the conjugal pact, results in being "sealed" or "consummated" in intercourse.[3] Up to this point, this gradual structure was culturally rooted during the Middle Ages, during which the

1. Cf. C. LARRAINZAR, "La distinción entre 'fides pactionis' y 'fides consensus' en el 'Corpus Iuris Canonici'," in *Ius Canonicum* 21 (1981), pp. 36–57.
2. Cf. J. CARRERAS, "L'antropologia e le norme di capacità per celebrare il matrimonio," in *Ius Ecclesiae* 4 (1992), pp. 79–150.
3. Cf. T. RINCÓN-PÉREZ, *El matrimonio, misterio y signo: siglos XI–XIII* (Pamplona 1971); E. TEJERO, *El matrimonio: misterio y signo, siglos XIV–XVIII* (Pamplona 1971); F. LÓPEZ ZARZUELO, *El proceso canónico de matrimonio rato y no consumado* (Valladolid 1991), pp. 3–65.

spouses had two months after the celebration of the conjugal pact to decide if they were to have intercourse and consummate the marriage or enter into religious life. If one or both spouses opted for religious profession, neither the consent of the other spouse nor a formal dispensation from the ratified but not consummated marriage was required.[4]

The fact that indissolubility is commonly joined to the external declaration of consent also has a reason of a historical nature. The canonical marriage system has been gradually articulated over the principle of consent as the efficient cause of matrimony and is understood together with the categories of contracts. The dispensation from a ratified, non-consummated marriage presupposed a justified exception to the principle of indissolubility, the argument being that the spouses neither had an effective knowledge of themselves (in the biblical sense of the expression) nor was the sacramental sign complete in its total integrity.

2. *An applicable norm and principles in which the new special process finds inspiration*

The *CIC* not only recognizes the limited norm of *CIC*/1917, but also has considered the abundant regulations presented throughout the present century in the spirit of Vatican II. The modern prescription is influenced by the following principles:

a) the simplicity of the procedure;

b) the speed or timeliness in the administration of the pontifical favor; and

c) the pastoral dimension of the entire process.[5]

The dispositions contained in c. 1697 and in the following canons are elaborated in other complimentary norms issued by the Holy See:

a) Decr. *Catolica doctrina*, May 7, 1923;[6]

b) The norms of the SCDS of March 27, 1929, which take precautions against the fraudulent substitution of persons;[7]

4. Cf. F. CANTELAR, "El objeto del consentimiento matrimonial en la doctrina medieval," in *Curso de Derecho matrimonial y procesal canónico para profesionales del foro*, III (Salamanca 1978), p. 70; J. GAUDEMET, "Recherche sur les origines historiques de la faculté de rompre le mariage non consommé," in *Monumenta Iuris Canonici*, series C, VI (Vatican City 1980), pp. 309–331.

5. Cf. B. MARCHETTA, "Il processo 'super matrimonio rato et non consummato' del nuovo Codice di Diritto Canonico," in *Dilexit Iustitiam* (Vatican City 1984), p. 407.

6. Cf. *AAS* 15 (1923), pp. 389–436.

7. Cf. *AAS* 21 (1929), pp. 490–493.

c) Instr. *Quo facilius* of June 10, 1935,[8] and *Instructionem quo facilius* of June 13, 1953;[9]

d) Instr. *Dispensationis matrimonii* of March 7, 1972;[10]

e) The circular letter *De processu super matrimonio rato et non consummato* of December 20, 1986, sent by the SCSDW to all diocesan bishops, with definite norms for the process of dispensation.[11]

3. *Active Legitimation*

Once the necessary observations of a general character are made, it is advisable to undertake the principal problem of interpretation that c. 1697 presents. The expression "only the spouses," which represents the active capacity of the process *super rato*, would not present a major interpretative difficulty, were it not that some authors have set up the possibility that the public interest can on some occasion advise the petition for the dispensation ex officio or through the initiative of the ecclesiastical tribunal during the course of the case, if there is doubt about the non-consummation of the marriage.[12] At any rate, the expression employed by the legislator, limiting the active legitimation for the process of dispensation of the ratified, non-consummated marriage to the spouses, is so clear that one does not see what public interest can give as a justifiable reason for an exception. Really, we are not within the scope of the nullity of marriage (c. 1674), but before an actual and existing marriage, albeit non-consummated. For this reason, it does not seem that the case can be treated without one knowing the other spouse. The case can be handled without the agreement of both, and even with the opposition of "the other," but it cannot proceed without "the other" being informed of the existence of the process.[13]

8. Cf. *AAS* 27 (1935), pp. 333–340.
9. Cf. X. OCHOA, *Leges*, XI, no. 2361.
10. Cf. *AAS* 64 (1972), pp. 244–252.
11. Cf. *Comm.* 20 (1988), pp. 78–84.
12. Cf. O. BUTTINELLI, "Le procedure per lo scioglimento del vincolo matrimoniale. Il processo di dispensa del matrimonio rato e non consumato. La fase davanti al Vescovo diocesano," in *I procedimenti speciali nel diritto canonico* (Vatican City 1992), pp. 110–111.
13. Cf. ibid.

1698 § 1. Una Sedes Apostolica cognoscit de facto inconsummationis matrimonii et de exsistentia iustae causae ad dispensationem concedendam.

§ 2. Dispensatio vero ab uno Romano Pontifice conceditur.

§ 1. Only the Apostolic See gives judgement on the fact of the non-consummation of a marriage and on the existence of a just reason for granting the dispensation.

§ 2. The dispensation, however, is granted by the Roman Pontiff alone.

SOURCES: § 1: cc. 249 § 3, 1119, 1962, 1963; SCDS Regulae, 7 maii 1923, 1 et 2 (*AAS* 15 [1923] 392); *CA* 108; *SN* cc. 470, 471; SCEC Instr. *Instructionem quo*, 13 iul. 1953, 1; *CS* 196 § 3; *REU* 56; SCDS Instr. *Dispensationis matrimonii*, 7 mar. 1972, I (*AAS* 64 [1972] 245); Secr. St. Rescr., 15 iul. 1973 (*AAS* 65 [1973] 602)
§ 2: SCDS Regulae, 7 maii 1923, 102 (*AAS* 15 [1923] 413); SCEC Instr. *Quo facilius*, 10 iun. 1935, 1 (*AAS* 27 [1935] 334); *CA* 108; SCEC Instr. *Instructionem quo*, 13 iul. 1953, 1

CROSS REFERENCES: cc. 1084, 1704

COMMENTARY

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1. *The exclusive jurisdiction of the Holy See*

When one considers the historical, anthropological and theological foundations that support the Church's practice relative to the process of dispensation *super rato* (see commentary on c. 1697), one will readily understand that this is an authentic and legitimate exception to the principle of indissolubility. However, since it *is* an exception, the power to dissolve a ratified, non-consummated marriage is reserved to the Holy See. Only the Roman Pontiff can concede the dispensation.

The dispensation from a ratified, non-consummated marriage, as with the cases in which the Roman Pontiff possesses the power to dissolve non-sacramental marriages by the privilege of the faith, is based upon two principles: the *salus animarum* and the ministerial power of the Roman Pontiff.[1] While the *salus animarum* is not problematic in

1. Cf. PIUS XII, *Address to the Prelate Auditors and other officials and ministers of the Roman Rota, October 3, 1941*, in *AAS* 33 (1941), pp. 424–425.

itself, because recourse to this procedure in dissolving the conjugal bond is justified, yet, the nature of the power with which the Roman Pontiff proceeds to the dispensation of marriages that are valid and sacramental, has been widely discussed. This reduces to a discussion of the concept of power. In fact, the concept itself has greatly changed throughout the centuries.[2] "The doctrine of the Vatican Council II about the sacred power in the Church once again rather adopts the medieval doctrine of the vicarious power of the Roman Pontiff."[3]

Although the final decision of conceding the dispensation remains the competence of the Roman Pontiff, the process develops in two phases. The first is instructive, carried out before the diocesan curia, and the second is decisional, which, save for few exceptions,[4] is carried out before the CDWDS. Its competence is extended also to the suppositions that the marriage has been contracted "between a Catholic party and the other party who is non-Catholic or not baptized, and between two baptized non-Catholics, both having taken place within the territories of common law and in those which fall under the jurisdiction of the Congregation for the Evangelization of Peoples (mission territories)."[5] In cases in which conflicts of competence exist between the CDF and the CDWDS, because both are competent for the dissolution of marriage respectively by the privilege of the faith and for the dispensation *super rato*, the CDF, in a letter of June 30, 1987, prefers that the case proceed before the CDF not only for pastoral reasons, but because the circumstance from which the petition originates is the conversion to the faith.[6]

Finally, we must concentrate upon the other two central aspects of c. 1698 that constitute the very object of the process. First, a judgment must be made concerning the very fact of non-consummation. This is an important point because a dispensation from a consummated marriage would be invalid, since the marriage would be indissoluble, both intrinsically and extrinsically. Second, it must determined that just cause exists to grant the dispensation.

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2. Cf. A. MOLINA, *La disolución del matrimonio inconsumado* (Salamanca 1987), pp. 61–105.

3. R. BURKE, "Le procedure per lo scioglimento del vincolo matrimoniale. Il processo di dispensa dal matrimonio rato e non consumato. La grazia pontificia e la sua natura," in *I procedimenti speciali nel diritto canonico* (Vatican City 1992), p. 142.

4. Cf. G. ORLANDI, "Recenti innovazioni nella procedura 'super matrimonio rato et non consummato'," in *Il processo matrimoniale canonico* (Vatican City 1988), pp. 449–450.

5. Ibid.

6. Cf. ibid.

2. *Non-consummation and impotence: nullity and dispensation*

Frequently, the Church must judge cases in which nullity is alleged due to impotence (c. 1084). In many cases, ecclesiastical tribunals have dictated a negative sentence, because of an understanding that the conditions required for nullity are not given, but also realizing that the dispensation can be tried from a ratified, non-consummated marriage, and this is what they advise. It is also likely that many hypotheses of apparent non-consummation of the marriage are in fact cloaking authentic suppositions for nullity due to impotence.

These two concepts, nullity because of impotence and dispensation because of non-consummation, are mutually exclusive. If the marriage is null, there is nothing to consummate and, consequently, the dispensation is not practicable. If, on the contrary, the nullity of the marriage through that allegation is not evident—because, for example, the impotence is not perpetual, the process *super rato* can be attempted. As is evident, one is dealing with two distinct realities that demand distinct juridical solutions. The first is, the allegation of impotence considered by way of the ordinary contentious process, with the purpose of having the nullity of the bond declared. Second, the dispensation presupposes the existence of the bond, since what is requested is the favor of its dissolution due to non-consummation.

Therefore, every time non-consummation is due to impotence, whether absolute or relative, the process of nullity can be attempted. In this case, the spouses have a true right to start a process of nullity and this should be declared publicly where they succeed in proving impotence.

On the contrary, when one is dealing with the dispensation of a ratified, non-consummated marriage, we find ourselves before a marriage that is real and existing, and, consequently, before the non-existence of a right of those who seek to be vindicated. One is treating a concession on the part of the authority, an act to which there does not exist any type of subjective right on the part of the one to be vindicated. For this reason, the legislator has discussed this process in a form separate from the process of marriage nullity. While in this latter matter we stood before an authentic judicial process, dispensation from a ratified, non-consummated marriage has an administrative character.[7]

In order for one to be given a dispensation from a ratified, non-consummated marriage, it is essential that the consummation of the marriage has not been effected. In addition to the traditional requirements of "perfect intercourse," (erection, at least partial penetration and ejaculation within the vagina), one must add the human and existential determi-

7. Cf. F. LÓPEZ ZARZUELO, *El proceso canónico de matrimonio rato y no consumado* (Valladolid 1991), pp. 144–145.

nation of the act,[8] which must always have been done *humano modo*, in a form worthy of a man (c. 1061),[9] to effect the consummation. These other words which *Familiaris consortio*, 11, attributes to every truly conjugal act can be cited *a fortiori* concerning the consummative act, that of being the fruit and sign of the gift of the spouses effected in their covenant.

3. *The just cause for conceding the dispensation*[10]

The just cause for conceding the dispensation works like an inspiring principle for the entire process we are discussing (c. 1704). Although there does not exist a listing of just causes, the following can be considered as the ones usually employed: "An incurable abhorrence between the parties; the impossibility of reconciliation; the desire to contract a new marriage; the youthfulness of the parties and danger of incontinence; the definitive separation or the sentence of divorce that has already been pronounced; a civil marriage already contracted; the legitimation of children born outside of the marriage bond; probable or, at least, relative impotence; the spiritual welfare of the parties."[11] The fact that a determined ground is being invoked does not exempt the authorities from judging the case by way of a practical evaluation of whether there exists a serious balance between the cause being invoked, and the juridic effect of what the parties are petitioning.

8. Cf. ibid., pp. 75–93.
9. Cf. U. NAVARRETE, "De notione et effectibus consummationis matrimonii," in *Periodica* 59 (1970), pp. 636–637. More recently, F. LÓPEZ ZARZUELO, "La carta circular 'de processu super matrimonio rato et non consummato'. Texto y comentario," in *Revista Española de Derecho Canónico* 45 (1988) 540–553.
10. Cf. E. MAZZACANE, *La justa causa dispensationis nello scioglimento del matrimonio per inconsumazione* (Milan 1963); F. LÓPEZ ZARZUELO, *El proceso canónico...*, cit., pp. 115–122.
11. G. ORLANDI, "Recenti innovazioni...," cit., p. 460.

1699 **§ 1. Competens ad accipiendum libellum, quo petitur dispensatio, est Episcopus dioecesanus domicilii vel quasi-domicilii oratoris, qui, si constiterit de fundamento precum, processus instructionem disponere debet.**

§ 2. Si tamen casus propositus speciales habeat difficultates ordinis iuridici vel moralis, Episcopus dioecesanus consulat Sedem Apostolicam.

§ 3. Adversus decretum quo Episcopus libellum reicit, patet recursus ad Sedem Apostolicam.

§ 1. The diocesan Bishop of the place of domicile or quasi-domicile of the petitioner is competent to accept the petition seeking the dispensation. If the request is well founded, he must arrange for the instruction of the process.

§ 2. If, however, the proposed case has special difficulties of a juridical or moral order, the diocesan Bishop is to consult the Apostolic See.

§ 3. Recourse to the Apostolic See is available against the decree of a Bishop who rejects the petition.

SOURCES: SCDS Regulae, 7 maii 1923, 7–12 (*AAS* 15 [1923] 393–394); SCDS Rescr., 7 nov. 1970; SCDS Instr. *Dispensationis matrimonii,* 7 mar. 1972, I (*AAS* 64 [1972] 245)

CROSS REFERENCES: cc. 1678, 1695, 1701 § 2, 1703 § 1

COMMENTARY

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1. *Initiation of the process*

Since we are dealing with an administrative process, the legislator takes care to use an adequate terminology. Whoever begins the process is a *petitioner* (cc. 1701 § 2 and 1703 § 1), not a *plaintiff,* as in judicial processes. For the same reason, a *judge* does not exist in the strict sense, rather, an *instructor* gathers the necessary proofs so that the favor can be granted. When both spouses apply for the dispensation (c. 1697), the process develops with them as the *petitioner* party, nonetheless respecting the adversarial form, since the defender of the bond must necessarily intervene (c. 1701).

2. *The competent bishop*

The *forum contractus* is not applied for the same reason that we have seen before, because we are not "before a matter of a judicial nature, but what is being discussed here is a dispensation."[1] Although the instance in which one requests the dispensation of the favor must be directed to the Roman Pontiff, it is presented before the diocesan bishop of the domicile or quasi-domicile of the petitioner or the suppliants. Only in situations where special difficulties of a juridical or moral nature are found (c. 1699 § 2) will the diocesan bishop have to consult the Apostolic See. The circular letter of the SCSDW points out some difficulties that might warrant consultation: the onanistic use of marriage, penetration without ejaculation, conception through absorption of the semen, artificial insemination, the existence of children, a defect in the human manner of consummating the marriage, a danger of scandal or economic harm connected with the granting of the favor, *etc.*[2] Where the greater part of the proofs must be *de facto* examined in a location other than the domicile or quasi-domicile of the petitioner, an extension of the competence can be sought before the Congregation.[3]

After having received the petition for the dispensation, and before proceeding, the diocesan bishop must not only communicate to the other party that the process *super matrimonio rato et non consummato* has begun, but also try to persuade the spouses to resume their conjugal cohabitation and overcome the difficulties existing between them (cc. 1678 and 1695).[4] As one author fittingly points out: "It is certain that, in the majority of cases, when the written document of request for the dispensation *super rato* is presented, they have already exhausted all the possibilities before deciding to make the petition, that is to say, the *affectio coniugalis* has already disappeared. But there can be cases (and, in fact, there have been), in which, where conjugal love has not completely ceased, the pastoral purpose of reconciliation does have a positive result and consequently brings the spouses to the point of renewing their conjugal consortium. For this reason it is necessary that the pastoral intent of reconciliation in these cases be taken quite seriously, by listening to the parties separately and, if the hope of a reconciliation is discerned, by welcoming both and offering them not only help and counsel, but, in addition, by furnishing the appropriate medical means, psychologists or conjugal therapy, always on the condition that they are decent and lawful. This pastoral function should be carried out by the pastor of the spouses or another zealous and prudent

1. *Comm.* 4 (1972) p. 70.
2. Cf. SCSDW, Litt. *De processu super matrimonio rato et non consummato*, December 20, 1986, no. 2, in *Comm.* 20 (1988), p. 78.
3. Cf. ibid., no. 1.
4. Cf. ibid., no. 5.

priest, as has been established in the *Regulae servandae*, or by the personnel of the Centers of Family Orientation, established in many dioceses with positive results. Thus the purpose of reconciliation of the spouses should not be converted into a mere procedure since, in practice, on many occasions, the reconciliation was attempted but only with an interview of the party who has presented the document of the requests."[5]

Where this attempt at reconciliation is unfruitful, before one begins to instruct the case, one should insist that the spouses separate, if they are still living together. It suffices for them to proceed to the separation in fact, and it is not necessary to go back through the course of judicial or administrative separation.[6]

Where there has not been a reconciliation of the spouses, and if the petition is sufficiently founded and correctly formulated, the diocesan bishop will have to accept the petition with a decree and take care of the instruction of the process. If the bishop understands that the petition lacks a basis, he can reject it by means of decree, against which an appeal to the CDWDS is possible. Since this is an administrative process, the only possible recourse to appeal the pronouncement is before the Signatura (cc. 1739 § 1, 1445 § 2).

5. F. LÓPEZ ZARZUELO, "La carta circular 'de processu super matrimonio rato et non consummato'. Texto y comentario," in *Revista Española de Derecho Canónico* 45 (1988), pp. 557–58.

6. Cf. O. BUTTINELLI, "Le procedure per lo scioglimento del vincolo matrimoniale. Il processo di dispensa del matrimonio rato e non consumato. La fase davanti al Vescovo diocesano," in *I procedimenti speciali nel diritto canonico* (Vatican City 1992), p. 112.

1700 § 1. **Firmo praescripto can. 1681, horum processuum instructionem committat Episcopus, stabiliter vel in singulis casibus, tribunali suae vel alienae dioecesis aut idoneo sacerdoti.**

§ 2. **Quod si introducta sit petitio iudicialis ad declarandam nullitatem eiusdem matrimonii, instructio ad idem tribunal committatur.**

§ 1. Without prejudice to the provisions of can. 1681, the Bishop is to assign the instruction of these processes, in a stable manner or case by case, to his own tribunal or to that of another diocese, or to a suitable priest.

§ 2. If, however, a judicial plea has been introduced to declare the nullity of the same marriage, the instruction of the process is to be assigned to the same tribunal.

SOURCES: c. 1966; SCDS Regulae, 7 maii 1923, 13–19 (*AAS* 15 [1923] 394–395); SCEC Instr. *Quo facilius*, 10 iun. 1935, 5 et 6 (*AAS* 27 [1935] 334); *SN* can. 474; SCEC Instr. *Instructionem quo*, 13 iul. 1953, 6–7; SCDS Instr. *Dispensationis matrimonii*, 7 mar. 1972, II a (*AAS* 64 [1972] 248)

CROSS REFERENCES: c. 1681

COMMENTARY

Joan Carreras

Canon 1700 seems to exclude *a sensu contrario* that the bishop can personally instruct the process *super rato*. Whom will he designate as the instructor of the process? There are three possibilities: the first two are associated with an eventual trial of marriage nullity, and the third is independent of the judicial trial.

1. *Hypothesis of c. 1681. "Firmo praescripto can. 1681..."* (c. 1700 § 1)

A consequence results from the investigation that took place in the trial for the nullity of marriage for the process *super rato*. When there arises a "very probable doubt" that the consummation has taken place, the tribunal "with the consent of the parties" can instruct the process for the

dispensation. For that it is necessary to suspend the case of nullity, in such a form that not only does the consent of both parties amount to a renunciation of the judicial route,[1] but also for the tribunal to move on to function as an administrative body. It must complete the instruction of the process *super rato* itself and "finally transmit the acts to the SCSDW together with the petition for the dispensation, the comments of the defender of the bond, the vote of the tribunal and that of the Bishop."[2]

It is important to note that the circular letter *De processu super matrimonio rato et non consummato* states clearly that the doubt about non-consummation can arise in the context of any trial for matrimonial nullity, independently of the allegation being discussed. Therefore, there is no need for it to deal with a process in which one examines the nullity due to impotency,[3] nor must it have at its disposal authentic proof of non-consummation, since a very probable doubt suffices. The circular letter of the Congregation has filled a normative loophole and ended a doctrinally controversial discussion, since it has established in what manner the tribunal has to suspend the judicial case of nullity, namely by decree.[4] The case is suspended by means of a decree, therefore, it is not necessary to expect that a sentence would be issued resolving the object of the trial of nullity.

2. *Hypothesis of § 2*

It can also happen that the parties might begin the process *super matrimonio rato* simultaneously or consecutively before the diocesan bishop and a process of nullity before a determined diocesan tribunal. In this case, c. 1700 § 2 prescribes that the instruction begin at the same tribunal as the one of nullity. The circular letter specifies that this must be done apart from whether the request for the favor has preceded the judicial petition or it has been presented after it.[5]

The fact that the same tribunal is occupied both in the process of nullity and with the instruction of the process *super matrimonio rato* does not imply an accumulation of procedures. The two processes must

1. Cf. F. LÓPEZ ZARZUELO, "La carta circular 'de processu super matrimonio rato et non consummato'. Texto y comentario," in *Revista Española de Derecho Canónico* 45 (1988), p. 559; in a different sense, O. BUTTINELLI, "Le procedure per lo scioglimento del vincolo matrimoniale. Il processo di dispensa del matrimonio rato e non consumato. La fase davanti al Vescovo diocesano," in *I procedimenti speciali nel diritto canonico* (Vatican City 1992), p. 115. The fact of renouncing the action, in effect, does not prevent the parties from later resuming the case, since we are dealing with the processes regarding the state of the persons.

2. SCSDW, Litt. *De processu super matrimonio rato et non consummato,* December 20, 1986, no. 7, in *Comm.* 20 (1988), p. 81.

3. Cf. c. 1963 §2 CIC 17; O BUTINELLI, "Le procedure...," cit., p. 114.

4. SCSDW, Litt. *De processu super matrimonio rato...*, cit., no. 7.

5. Cf. ibid., no. 5.

be followed in a form that is independent and parallel, since their nature and finality are distinct. This does not prevent the assumption of c. 1681 from being produced, that is to say, the "very probable doubt" about the fact of the consummation. In that case, there would have to be a progression in the manner that we have seen in the previous hypothesis. As long as this does not happen, the same tribunal that recognizes the case for nullity instructs the two processes. For this it is not necessary that the spouses be in agreement, since the attraction of the administrative process for the tribunal of nullity is by prescription of c. 1700 § 2.

3. *The application of the petition for dispensation, independent of any action of nullity*

In cases where one or both spouses directly present the application for the favor and have not presented an action for marriage nullity, the diocesan bishop can entrust the instruction of the process either to an ecclesiastical tribunal or to a suitable priest. In the first case, it makes no difference whether it is treated in the proper diocesan tribunal or one pertaining to another diocese. The liberty of the bishop, *servatis de iure servandis*,[6] also extends to the possibility of his making this designation of the tribunal or of a special suitable priest in a stable manner or for an individual case.

6. Ibid.

1701 **§ 1. In his processibus semper intervenire debet vinculi defensor.**

§ 2. Patronus non admittitur, sed, propter casus difficultatem, Episcopus permittere potest ut iurisperiti opera orator vel pars conventa iuvetur.

§ 1. In these processes, the defender of the bond must always intervene.

§ 2. An advocate is not admitted, but the Bishop can, because of the difficulty of a case, allow the petitioner or respondent to have the assistance of an expert in the law.

SOURCES: § 1: c. 1967; SCDS Regulae, 7 maii 1923, 27 (*AAS* 15 [1923] 398); SCEC Instr. *Quo facilius*, 10 iun. 1935, 5 (*AAS* 27 [1935] 334); *SN* can. 475; SCDS Litt., 15 ian. 1937; SCEC Instr. *Instructionem quo*, 13 iul. 1953, 6
§ 2: SCDS Instr. *Dispensationis matrimonii*, 7 mar. 1972, IIe (*AAS* 64 [1972] 249–250)

CROSS REFERENCES: cc. 1060, 1432, 1433, 1698, 1705 § 3

COMMENTARY

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Although the process *super matrimonio rato* is of an administrative nature and does not have as its object the declaration of the nullity of the marriage, but rather its dissolution, the legislator wants to provide some of the technical instruments and procedural guarantees that the law has laid out for trials of marriage nullity.

1. *Participation of the defender of the bond*

The non-intervention of the defender of the bond is sanctioned with the pain of nullity, in accordance with c. 1433.

As the Roman Pontiff has pointed out in a celebrated address to the Roman Rota, the specific role of the defender of the bond "in his collaborating in the discovery of the objective truth, consists in the obligation 'to propose and explain all the reasons which can be adduced against nullity' (c. 1432). Given that the marriage affects the public welfare of the Church and 'enjoys the favor of the law' (c. 1060), the role of the defender of the bond is irreplaceable and of the greatest importance. Therefore, his

absence in the trial of nullity of marriage makes the acts null (c. 1433). As I had the occasion to recall, in recent times 'unfortunately ... tendencies are being observed which want to alter his role' to the point of confusing it with the other participants in the process, or to reduce it to some insignificant formal procedure, practically eliminating his intervention in the dialectic procedure as the qualified person who investigates, proposes and clarifies all that can be reasonably adduced against the nullity, an elimination which would bring serious harm to the correct administration of justice. I consider, because of this, that it is a duty for us to remember that the defender of the bond 'is bound' (c. 1432), that is to say, he has the obligation—not the simple faculty—to carry out his specific mission with seriousness."[1]

These observations about the function of the defender of the bond in the trial of marriage nullity can be applied *mutatis mutandis* to the process *super matrimonio rato*. In fact, all the perseverance and pastoral care of the defender of the bond will have to be directed not only to make sure whether moral certitude of the non-consummation can be effectively acquired, but also to prove whether there is a just cause to concede the dispensation (c. 1698). In a more generic way, but also with force and clarity, the circular letter of the SCSDW points out that the defender of the bond "is obligated by his office to propose and to explain all the objections which can be reasonably brought out against the dispensation from the marriage."[2]

2. *The possible participation of a legal expert*

Although the intervention of the advocate is not admitted, the legislator establishes that the supplicant or the respondent can be given the help of a legal expert in the situations of difficulty. There will be parties who will ask permission to appeal for the professional services of a jurist. In that case, although the bishop is always free to give that permission or to deny it, *permittere potest* (c. 1701 § 2), it will generally be advisable that the petition be granted.

Nonetheless, it is necessary to clarify that this legal expert does not exercise the same function that is fulfilled by the advocate in trials of nullity. He would lack practically all of the procedural prerogatives, if it were not for the rare functions that the current law attributes to him[3] (c. 1705 § 3).

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1. JOHN PAUL II, *Address to the Officials and Advocates of the Tribunal of the Roman Rota*, January 25, 1988, p. 20.
2. SCSDW, Litt. *De processu super matrimonio rato et non consummato*, December 20, 1986, no. 22, in *Comm.* 20 (1988), p. 84.
3. Cf. ibid., no. 27.

The function of the legal expert, according to what one author has deduced in his commentary upon the circular letter *De processu*, no. 6,[4] is "*introductory,* since it facilitates for the parties the editing of the petition or their request for the favor, and *instructive*, since he helps the parties in looking for testimonies or documents marshaled to discover the truth of the facts and *complementary,* since he proposes additional elements for an eventual new examination of the proofs, in the situation where the case had ended negatively. The role of the law expert can never be defensive or as a person who makes rejoinders to the observations of the defender of the bond."[5]

4. Cf. ibid.
5. G. ORLANDI, "Recenti innovazioni nella procedura 'super matrimonio rato et non consummato'," in *Il processo matrimoniale canonico* (Vatican City 1988), p. 452.

1702 **In instructione uterque coniux audiatur et serventur, quatenus fieri possit, canones de probationibus colligendis in iudicio contentioso ordinario et in causis de matrimonii nullitate, dummodo cum horum processum indole componi queant.**

In the instruction of the process, both spouses are to be heard. As far as possible, and provided they can be reconciled with the nature of these processes, the canons concerning the collection of proofs in the ordinary contentious process and in cases of nullity of marriage are to be followed.

SOURCES: SCDS Regulae, 7 maii 1923, 20–96 (*AAS* 15 [1923] 396–411); SCDS Normae, 27 mar. 1929 (*AAS* 21 [1929] 490–493); SCEC Instr. *Quo facilius*, 10 iun. 1935, 8–25 (*AAS* 27 [1935] 335–339); SCEC Instr. *Instructionem quo*, 13 iul. 1953, 9–28; SCDS Instr. *Dispensationis matrimonii*, 7 mar. 1972, II a–d (*AAS* 64 [1972] 248–249)

CROSS REFERENCES: cc. 1532, 1560 § 2, 1561, 1564, 1572, 1577, 1578, 1592, 1679

COMMENTARY

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1. *The declarations of the parties and of the witnesses: the moral argument*

Canon 1702 distinguishes between the declarations of the spouses, the material parties of the process *super matrimonio rato*, and the other means of proof. It is obvious that one is treating an obligatory distinction if one considers that the object of the process affects an especially intimate question, which nobody can declare and prove more adequately than the spouses, as to both the hypothetical non-consummation and the existence of a just cause for the dispensation.

It would be neither human nor Christian to begin by doubting and suspecting the spouses. For this reason, in no case will there be an obligation to disregard what the spouses themselves think. Their declarations must enjoy a great value and be carefully considered.

The circular letter *De processu* establishes a series of norms relative to the instructory phase that affect the participation and the depositions

of the parties in the process. We shall next write about those norms that pertain to the "moral argument:"

a) Testimony concerning the credibility and integrity of the parties and witnesses must be obtained with the assistance of the pastors.[1] "Although it is certain that parish references, the same as other sorts of reports, only have clue and accessory force of evidence, yet their testimonies are very highly esteemed when they are founded upon happenings at which the informants were present or upon documentary data."[2]

b) If it is possible to obtain the testimonies mentioned, other information will be sought as far as possible, to add adequately to the proceedings.[3]

c) For the situations in which one of the spouses or any of the witnesses is reticent to speak in the presence of the judge, the circular letter sets up other suitable measures so that the process can benefit from such an appreciated deposition, if the authenticity and the genuineness of what has been declared may be established.[4] It explicitly mentions the following measures: the declaration before a cleric or layperson delegated by the judge, and the respective depositions made through the medium of the public notary or through another legitimate means, such as personal letters.[5]

d) The non-appearance of the parties in the process must be declared in conformity with the norm of law (c. 1592) and pointed out in the acts.[6]

e) The parties and the witnesses must take an oath that they are telling the truth (c. 1532), as well as to answer the questions *servato modo praescripto* (cc. 1561 and 1564) which are presented by the instructor or the defender of the bond.[7]

f) In the interrogation of the woman, when she is a party in the case, the instructor must provide for the presence of a doctor, named ex officio, who is irreproachable for his piety, moral integrity and age.[8]

g) As for what concerns the witnesses, the circular letter refers to the general norm of c. 1572, indicating that it is not necessary that there be

1. Cf. SCSDW, Litt. *De processu super matrimonio rato et non consummato*, December 20, 1986, n. 8, in *Comm.* 20 (1988), p. 80. Cf. cc. 1572 and 1679.
2. F. López Zarzuelo, "La carta circular 'de processu super matrimonio rato et non consummato'. Texto y comentario," in *Revista Española de Derecho Canónico* 45 (1988), pp. 561–562.
3. Cf. SCSDW, Litt. *De processu super matrimonio rato...*, cit., no. 8.
4. Cf. ibid., no. 9.
5. Cf. ibid.
6. Cf. ibid., no. 10.
7. Cf. ibid., no. 11.
8. Cf. ibid., no. 12.

a certain number of witnesses.[9] The witnesses are guarantors for the moral argument in referring to: 1) *what* they have heard on the part of the spouses, their relatives or any other person, with reference to the non-consummation; 2) *when* they heard such declarations, whether "in a suspect time" or not, meaning, after the separation of the spouses, or rather before it had entered into their mind to seek a pontifical dispensation; 3) *how* and under what circumstances they have arrived at a knowledge of the facts.[10]

h) Finally, the circular letter points out that all the elements or arguments that they consider useful and licit can be brought up to know the case with accuracy.[11]

2. *The "physical argument" of the non-consummation*

The instructor will have to avail himself of the report of one or more experts.[12] Although, in exceptional cases, the report of only one expert can be sufficient, the normal procedure is to resort to two or more. When there would have been discrepancies between the expert opinions, there will be some application, in accordance with what is laid out in the same circular letter, of c. 1560 § 2, which establishes the possibility of actualizing a confrontation among them, avoiding dissensions and scandal. If the discrepancies persist, and when the instructor thinks it opportune, a *peritior* (a person more expert than the ordinary expert) or *peritissimus* (a person supremely expert over all the others) will be named to settle the question.[13]

In order that the expert, "having taken an oath," can discharge his function, he must be provided with the acts of the case and any other documents that are pertinent and necessary. Likewise, the instructor can formulate various questions so they might be studied and explained by the expert (cc. 1577 and 1578).[14]

The corporal inspection will only occur when it is necessary to attain moral certitude concerning the non-consummation. It can be omitted when the instructor has arrived at that certitude by means of the moral argument. When it is evident that the non-consummation has its origin in the incapacity of the husband or when the wife definitely denies it, the

9. Cf. ibid., no. 13.
10. G. ORLANDI, "Recenti innovazioni nella procedura 'super matrimonio rato et non consummato'," in *Il processo matrimoniale canonico* (Vatican City 1988), p. 457.
11. Cf. SCSDW, Litt. *De processu super matrimonio rato...*, cit., no. 14.
12. Cf. ibid. no. 15.
13. Cf. ibid., no. 20.
14. Cf. ibid., nos. 16 and 17.

instructor will not have to require immediate attention to the corporal inspection of the woman.[15] In this last case, she must be warned of the consequences of her refusal.[16]

If the instructor thinks it advisable, other medical interrogations may be made privately, and the resulting documents and certifications will be added to the acts of the case.[17]

15. Cf. G. ORLANDI, *Recenti innovazioni...*, cit., pp. 458–460, for the more substantial aspects in this regard.
16. Cf. SCSDW, Litt. *De processu super matrimonio rato...*, cit., no. 18.
17. Cf. ibid., no. 19.

1703 **§ 1. Non fit publicatio actorum; iudex tamen, si conspiciat petitionipartis oratricis vel exceptioni partis conventae grave obstaculum obvenire ob adductas probationes, id parti cuius interest prudenter patefaciat.**

§ 2. Parti instanti documentum allatum vel testimonium receptum iudex ostendere poterit et tempus praefinire ad deductiones exhibendas.

§ 1. There is no publication of the acts, but if the judge sees that, because of the proofs tendered, a serious obstacle stands in the way of the plea of the petitioner or the exception of the respondent, he is prudently to make it known to the party concerned.

§ 2. To the party requesting it, the judge can show a document that has been presented or evidence that has been received, and he can set a time for the production of arguments.

SOURCES: c. 1985; SCDS Regulae, 7 maii 1923, 97 (*AAS* 15 [1923] 412); SCEC Instr. *Instructionem quo,* 13 iul. 1953, 31; *SN* can. 492

CROSS REFERENCES: cc. 1678, 1701 § 2

COMMENTARY

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The instructorial phase ends when all the necessary probatory materials are at hand so one can advance into the decisional phase. Nonetheless, since the instruction is not of a judicial nature, but is developed within diocesan limits, the legislator now dedicates two canons indicating the conclusive steps for the instruction, which must precede the sending of the acts to the Holy See.

The acts are not published. Although c. 1703 begins with an emphatic affirmation, it is soon mitigated, since it leaves to the judge's discretion the decision to inform the interested party of the existence of proofs that can entail an obstacle for its successful outcome, whether it is from the petitioner, the suppliant, or the defense presented by the respondent.

One is dealing here with a measure that underscores the prudence of the legislator.The principles and techniques proper to the trial for nullity cannot be transferred here, since they tend to favor not only the secret instructional process but also the right for a hearing of the parties (c. 1678).

Since we find ourselves before the petition for a favor, the principle of a hearing is not violated by the fact that the parties are not allowed access to the compiled material. Nonetheless, a desire does exist to temper the rigidity of the secret instructional part of the procedure. This is made evident by allowing the judge to communicate the existence of the elements that are adverse to the outcome of his position as suppliant or respondent to the interested party. The instructor has the duty to see that the case reach the decisional phase with all the necessary elements, so that the Roman Pontiff can decide whether to concede the dispensation. For this reason, c. 1703 § 2 provides that "the judge can show to the interested party a document that has been presented or a testimony that was received and he can fix a time period for the presentation of conclusions." Although one is not treating a right in its strict sense, since the judge cannot furnish the solicited document, it is highly advisable for the instructor, insofar as possible, to attend to the requests of the parties.

Logically, when the parties are able to inspect the acts for themselves, a period of time for presenting the inferences and counterproofs that they consider suitable is also granted. As far as the legal experts of the parties are concerned, one might think that the right that belongs to their respective clients to examine the acts would also belong to them. However, although the examination of the acts may be extended to the experts, it does not appear that the same can be said with respect to the claimed right to present allegations after the previously mentioned examination: "It is not the right of the expert to present allegations or defenses in the manner of advocates, since this is not an act of completing the acts and presented proofs"[1] (cf. c. 1701 § 2).

1. L. DEL AMO, commentary on c. 1703, in *CIC Pamplona*.

1704 **§ 1. Instructor, peracta instructione, omnia acta cum apta relatione deferat ad Episcopum, qui votum pro rei veritate promat tum super facto inconsummationis tum super iusta causa ad dispensandum et gratiae opportunitate.**

§ 2. Si instructio processus commissa sit alieno tribunali ad normam can. 1700, animadversiones pro vinculo in eodem foro conficiantur, sed votum de quo in § 1 spectat ad Episcopum committentem, cui instructor simul cum actis aptam relationem tradat.

§ 1. When the instruction is completed, the instructor is to give all the acts, together with a suitable report, to the Bishop. The Bishop is to express his opinion on the merits of the case in relation to the alleged fact of non-consummation, the adequacy of the reason for dispensation, and the opportuneness of the favor.

§ 2. If the instruction of the process has been entrusted to another tribunal in accordance with can. 1700, the observations in favor of the bond of marriage are to be prepared in that same tribunal. The opinion spoken of in § 1 is, however, the province of the Bishop who gave the commission and the instructor is to give him, together with the acts, a suitable report on the case.

SOURCES: SCDS Regulae, 7 maii 1923, 98 (*AAS* 15 [1923] 412); SCEC Instr. *Quo facilius,* 10 iun. 1935, 27 (*AAS* 27 [1935] 340); SCDS Resp., 31 iul. 1941; SCEC Instr. *Instructionem quo,* 13 iul. 1953, 30; SCDS Instr. *Dispensationis matrimonii,* 7 mar. 1972, II f (*AAS* 64

CROSS REFERENCES: cc. 1698, 1700, 1701

COMMENTARY

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The instructional phase has its crowning point in the vote *pro rei veritate* prepared by the bishop. However, since the bishop does not generally instruct the process, it is necessary that the acts of the case be provided, together with the report of the instructor.Since, however, the responsibility for this vote falls to the bishop, the instructor will accomplish his duty by limiting himself to transmitting the acts of the process to the bishop, joining to it his own vote of a chronological-narrative

character.[1] In other words, the instructor must avoid writing or reasoning about the basis of the issue, since he would be influencing the bishop, creating "prejudices" or openly contradicting what he holds: *vitari debet occasio exprimendi iudicium circa meritum causae, quod influxum habere possit in votum Episcopi vel ipsi voto Episcopi contradicat.*[2] Therefore, he will be limited to narrating how the process has developed, making mention of the eventual incidentals or delays. This added résumé to the acts of the process can be of great usefulness to the bishop.

The vote *pro rei veritate* must have a minimum obligatory content, established in § 1 of c. 1704, including the fact of the non-consummation, the just cause for the dispensation, and the advisability for obtaining that favor. For the first two, see commentary on c. 1698.

Whether or not the favor might be obtained is a prerogative of the bishop, since he is in a position to consider all the elements, juridical, moral and social, which the case presents. This is a prudential judgment that must be made conscientiously, keeping in mind the responsibility of a pastor. The bishop must not only bear in mind the spiritual well-being of the parties of the process, but also the consequences that the pontifical favor will have in his diocese.[3] This discreet judgment will be appropriately examined and evaluated by the Congregation in such a way that it will not balk at it except when there exist grounds to do so.[4]

The circular letter of the SCSDW underscores this obligation of the bishop, when it states that *Episcopus per se ipsum hoc votum exaret.* The letter also, however, allows the possibility that he, in a stable manner, should delegate his powers to the vicar general or to the episcopal vicar by means of a special mandate. In this case, the bishop must make his vote the vote of his vicar, before sending the procedures to the Congregation.[5]

Canon 1704 § 2 also reflects the possibility that the process would have been instructed by a different tribunal (c. 1700 and 1701§ 1). In that case, the tribunal of the instructor-judge will have to hand over the acts of the process, together with the appropriate report, to the bishop who gave the commission.

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1. Cf. B. MARCHETTA, "Il processo 'super matrimonio rato et non consummato' del nuovo Codice di Diritto Canonico," in *Dilexit Iustitiam* (Vatican City 1984), p. 427.
2. *Comm.* 9 (1979), p. 278.
3. Cf. SCSDW, Litt. *De processu super matrimonio rato et non consummato*, December 20, 1986, no. 23, in *Comm.* 20 (1988), p. 84.
4. Cf. O. BUTTINELLI, "Le procedure per lo scioglimento del vincolo matrimoniale. Il processo di dispensa del matrimonio rato e non consumato. La fase davanti al Vescovo diocesano," in *I procedimenti speciali nel diritto canonico* (Vatican City 1992), p. 121.
5. Cf. SCSDW, Litt. *De processu super matrimonio rato...*, cit., no. 23 a). Regarding this point, cf. the commentary of F. LÓPEZ ZARZUELO, "La carta circular 'de processu super matrimonio rato et non consummato'. Texto y comentario," in *Revista Española de Derecho Canónico* 45 (1988), p. 567.

The cited letter recalls an arrangement already provided before, but this canon says nothing about it. In fact, in cases of the transition from the judicial procedure to the administrative procedure, the bishop of the aforementioned tribunal may lack sufficient information to make a judgment about the advisability for the dispensation. For this reason, the letter orders the previously mentioned bishop to seek the counsel of the bishop of the suppliant, since only he "can know if, from the concession of the dispensation, whether scandal can ensue in the diocese where the suppliant is living."[6]

6. F. LÓPEZ ZARZUELO, "La carta circular...," cit., p. 568.

1705 **§ 1. Acta omnia Episcopus una cum suo voto et animadversionibus defensoris vinculi transmittat ad Sedem Apostolicam.**

§ 2. Si, iudicio Apostolicae Sedis, requiratur supplementum instructionis, id Episcopo significabitur, indicatis elementis circa quae instructio complenda est.

§ 3. Quod si Apostolica Sedes rescripserit ex deductis non constare de inconsummatione, tunc iurisperitus de quo in can. 1701, § 2 potest acta processus, non vero votum Episcopi, invisere in sede tribunalis ad perpendendum num quid grave adduci possit ad petitionem denuo proponendam.

§ 1. The Bishop is to transmit all the acts to the Apostolic See, together with his opinion and the observations of the defender of the Bond.

§ 2. If, in the judgement of the Apostolic See, a supplementary instruction is required, this will be notified to the Bishop, with a statement of the items on which the acts are to be supplemented.

§ 3. If, however, the answer of the Apostolic See is that the non-consummation is not proven from the proofs submitted, then the expert in law mentioned in can. 1701 § 2 can inspect the acts of the case, though not the opinion of the Bishop, in the tribunal office, in order to decide whether anything further of importance can be adduced to justify another submission of the petition.

SOURCES: § 1: c. 1985; SCDS Regulae, 7 maii 1923, 98 § 2, 101 (*AAS* 15 [1923] 412); SCEC Instr. *Quo facilius*, 10 iun. 1935, 28 (*AAS* 27 [1935] 340); *SN* can. 492; SCEC Instr. *Instructionem quo*, 13 iul. 1953, 31; SCDS Instr. *Dispensationis matrimonii*, 7 mar. 1972, II g (*AAS* 64 [1972] 250–251)
§ 2: SCDS Instr. *Dispensationis matrimonii*, 7 mar. 1972, I a (*AAS* 64 [1972] 245–246)
§ 3: SRR Rescr., 13 feb. 1942

CROSS REFERENCES: cc. 1681, 1701 § 2, 1706

COMMENTARY

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1. *The consignment of the acts to the Apostolic See*

The dispatch of the acts of the case to the Apostolic See is an indispensable phase of the process *super matrimonio rato*, since only the Roman Pontiff is competent to concede the dispensation. This dispatch to the CDWDS will be carried out:

a) By the bishop himself, adding his own vote *pro rei veritate*, the observations of the defender of the bond, and the report of the instructor. It is not necessary that the originals be sent, since they must remain in the safekeeping of the archives of the curia or in the tribunal, except when the CDWDS expressly demands that they be sent. The Instr. *Dispensationis matrimonii* established that three copies be sent, duly authenticated.

b) By the tribunal referenced in c. 1681: "Whenever in the course of the instruction of a case a very probable doubt arises that the marriage has not been consummated, the tribunal can, having with the consent of the parties suspended the nullity case, complete the instruction for a dispensation from a non-consummated marriage, and in due course forward the acts to the Apostolic See, together with a petition for a dispensation from either or both of the spouses, and with the vote of the tribunal and of the Bishop."

2. *The decisional phase*

The Holy See can respond in three ways: by asking for a supplement to the instruction, by denying the concession of the dispensation, or by conceding it. The first two are regulated in this canon, and the third is addressed in c. 1706.

a) Regarding the supplement to the instruction, one reason it is suitable to allow the parties ample opportunity to participate is the necessity that the process be instructed in a complete way. Above all, in situations where antagonism exists between the parties, the instructor will do well in allowing them to become parties to the legal action throughout the process, always in a way that the circumstances of dignity, reputation, public order, and such-like recommend, because otherwise the case will remain insufficiently instructed. When this has occurred, the Holy See will let the bishop know that a supplement to the instruction is required and the aspects with which this instruction must deal (§ 2).

b) When the denial of the dispensation results from the fact that non-consummation has been insufficiently established, and always that the jurist on the part of the suppliant would have intervened (cf. c. 1701 § 2), this person will be given the opportunity to examine the acts of the process in the office of the tribunal or of the archives of the curia, with the express exception of the vote *pro rei veritate* of the bishop. The legal expert will also consider whether a serious reason can be adduced to permit the presentation of a new petition (§ 3).

1706 Rescriptum dispensationis a Sede Apostolica transmittitur ad Episcopum; is vero rescriptum partibus notificabit et praeterea parocho tum loci contracti matrimonii tum suscepti baptismi quam primum mandabit, ut in libris matrimoniorum et baptizatorum de concessa dispensatione mentio fiat.

The rescript of dispensation is sent by the Apostolic See to the Bishop. He is to notify the parties of the rescript, and as soon as possible direct the parish priests of the place where the marriage was contracted and of the place where baptism was received, to make a note of the granting of the dispensation in the registers of marriage and baptism.

SOURCES: SCDS Regulae, 7 maii 1923, 102–106 (*AAS* 15 [1923] 413); SCDS Instr. *Dispensationis matrimonii*, 7 mar. 1972, III (*AAS* 64 [1972] 251–252)

CROSS REFERENCES: cc. 59, 1075, 1077 § 2, 1699

COMMENTARY

Joan Carreras

1. *The rescript of dispensation from a ratified, non- consummated marriage*

Although the Roman Pontiff is the author of the rescript, since he grants the dispensation independently from this dispensation being sent directly to the interested parties, this canon directs that the administrative act be sent to the bishop. In this way, there is a consolidation of that which had already been the practice of the CDWDS. The bishop, not the Apostolic See, must notify the parties of the rescript, since the bishop is responsible for sending the dispensation to the pastors of the place where the marriage was celebrated and where the parties received baptism, with the objective of having the dispensation recorded in the baptism and marriage registers. The notification to the parties and the annotation in these registers are important juridical acts, the combined execution of which becomes facilitated by means of the dispatch of the rescript to the bishop who instructed the process (c. 1699 § 1).

The Spanish juridical system, however, provides that the interested parties solicit the civil judge of the family or of first instance for the civil efficacy of the canonical resolution of a ratified, non-consummated

marriage, in accordance with art. VI, 2, of the Agreement about the juridical matters between the Holy See and the Spanish government of January 3, 1979 and in art. 80 of the civil Code.[1]

2. *The prohibition of a new marriage possibly contained in the rescript of dispensation*[2]

The rescript of dispensation from a ratified, non-consummated marriage involves the dissolution of the conjugal bond. Therefore, it leaves the parties free to contract new marriages. The dispensation does not normally bring with it a prohibition to contract a new marriage when the non-consummation was not due to some cause which, by its more or less permanent character, prevents the accomplishment of the conjugal obligations, whether through bad will or through the lack of the minimum capacity. When these latter circumstances do occur, the CDWDS is accustomed to send the rescript to the bishop, joining to it a prohibition to contract a new marriage. Such a prohibition does not constitute an impediment in the strict sense (cf. c. 1075), and therefore, it will not enjoy in principle an invalidating or nullifying efficacy and will affect only the licitness of the act (cf. c. 1077 § 2). When the non-consummation was due to bad will (simulation, deception, etc.), the prohibition seems to present a punitive character. Since the final reason for the prohibition is the defense of the sanctity of the marriage that the person wishes to contract, it does not make sense to maintain the prohibition when there is repentance and a change in the attitude of the parties.

There are two types of prohibitions: the *vetitum* and the clause *ad mentem*. The *vetitum* is usually imposed when the cause of the non-consummation corresponds to a physical or psychic deficiency that makes the conjugal act impossible. For this reason, the *vetitum* can have an impedient nature, when it is expressly stated in this way, and it can be removed only by the Apostolic See.

The clause *ad mentem* corresponds to the presence of causes of minor importance for the non-consummation. As a matter of fact, "since (the cause) is of a different nature (moral, medical, juridical and economic), the clause *ad mentem* necessarily will have to have a formulation that is proper and distinct, directed to inform the bishop not only about the reasons and the administrative-pastoral dispositions that he must take in relation to the person responsible for the marital non-consummation, but also above all about the manner and the criteria to which the same

1. Cf. F. LÓPEZ ZARZUELO, *El proceso canónico de matrimonio rato y no consumado* (Valladolid 1991), p. 292. The author develops this theme in chap. 23.
2. One can find extensive information regarding this argument in F. LÓPEZ ZARZUELO, *El processo...*, cit., pp. 292–314.

bishop must attend to when, in his responsibility as a pastor, delegated by the Holy See, he is called to remove the clause and to authorize the step into the new marriage."[3] The causes that can make a clause *ad mentem* advisable are numerous, therefore, the range of formulations that this clause can adopt is very diverse. In any case, one is always dealing with prohibitions that only affect licitness, and the removal of them comes under the direct jurisdiction of the diocesan bishop.

In each case, the prohibitions to contract a new marriage must be annotated in the registers of marriage and baptism, together with the annotation of the rescript of the dispensation.

3. Ibid., p. 311.

CAPUT IV
De processu praesumptae mortis coniugis

CHAPTER IV
The Process in the Case of the Presumed Death of a Spouse

1707 **§ 1. Quoties coniugis mors authentico documento ecclesiastico vel civili comprobari nequit, alter coniux a vinculo matrimonii solutus non habeatur, nisi post declarationem de morte praesumpta ab Episcopo dioecesano prolatam.**

§ 2. Declarationem, de qua in § 1, Episcopus dioecesanus tantummodo proferre valet si, peractis opportunis investigationibus, ex testium depositionibus, ex fama aut ex indiciis moralem certitudinem de coniugis obitu obtinuerit. Sola coniugis absentia, quamvis diuturna, non sufficit.

§ 3. In casibus incertis et implexis Episcopus Sedem Apostolicam consulat.

§ 1. Whenever the death of a spouse cannot be proven by an authentic ecclesiastical or civil document, the other spouse is not regarded as free from the bond of marriage until the diocesan Bishop has issued a declaration that death is presumed.

§ 2. The diocesan Bishop can give the declaration mentioned in § 1 only if, after making suitable investigations, he has reached moral certainty concerning the death of the spouse from the depositions of witnesses, from hearsay and from other indications. The mere absence of the spouse, no matter for how long a period, is not sufficient.

§ 3. In uncertain and involved cases, the Bishop is to consult the Apostolic See.

SOURCES: cc. 1053, 1069 § 2; SCDS Rescr., 18 nov. 1920 (*AAS* 14 [1922] 96–97); SCDS Instr., 1 iul. 1929, 48 (*AAS* 21 [1929] 360); SCDS Instr., 29 iun. 1941, 4c (*AAS* 33 [1941] 300); *CA* 43, 59 § 2; Codcom Resp., 26 mar. 1952 (*AAS* 44 [1952] 496)

CROSS REFERENCES: cc. 1056, 1066, 1067, 1085, 1608

COMMENTARY

Joan Carreras

1. *Historical information*

The so-called "process of presumed death" is a typically canonical institute, that finds its foundation in the indissolubility of the conjugal bond. In Roman law, as long as there was no certain news relative to the death of a person, it was presumed that the person was still alive and would live until he had completed one hundred years.[1] Logically, and according to the Roman marriage system, based upon the *affectio maritalis*, this presumption did not prevent the other spouse from being able to enter a new marriage.

The Church could not accept this, since the Church is the repository of the truth of the Lord's proclamation: "What God has joined let no man put asunder." The decretal *Regressus ad nos*, of Pope Leo I to Nicetas, Bishop of Aquilaeia (Italy), dated March 21, 458, had to resolve a difficult juridical problem: how would one respond to those who, returning after a long captivity, found their spouses married to other husbands? The decretal states, "If the married people who come home after a long captivity continue in their love for their spouses and wish to cohabit with them, they have to forget and to act as though lacking in fault, insofar as the motivation was one of necessity, and then to return to what fidelity demands."[2] In this decretal, there was no judgment of the conduct of the wife and the second husband, a conduct which was tolerated, keeping in mind the particular historical and cultural circumstances, yet the right of the captive to come home to reestablish his home and the duty of his wife to receive him anew was settled.

Later, the Church would become more prohibitive of second marriages: "The wife of the man who left and does not turn up, if, before becoming certain of his death, she cohabits with another, is an adulteress;"[3] "May no one try to contract a second marriage when it is not evident with absolute certainty that her spouse has died. And if any man or any woman has not proceeded to this point in that way, and thinks that there are doubts about the death of the former spouse, then he or she does not deny the conjugal debt to the current spouse who seeks it, for which the spouse knows he must never ask. And if, after it has been evident that the

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1. Cf. D. 22, c. 2; R. MELLI, "Il processo di morte presunta," in *I procedimenti speciali nel Diritto canonico* (Vatican City 1992), p. 217.
2. LEO I, *Regressus ad nos*, ch. 3. We have employed the Spanish translation of the *Enchiridion Familiae*, I (Pamplona 1992), p. 27. This Decretal is collected in the Decree of Gratianus: C. 34, qq. 1–2.
3. CONC. CONST. IV (Trullano), *Canon 93*, in *Enchiridion Familiae...*, cit., p. 61.

previous spouse is living, that person, without the slightest doubt, having abandoned her former adulterous and illicit union, should return to him."[4]

From the time the Council of Trent (and for the entire Church, the decree *Ne temere)* instituted the canonical form *ad validitatem*, the dangers of second marriages have been almost non-existent, since such a norm presupposed a great control of social life.[5] In fact, cc. 1066 and 1067 establish a series of prescriptions that tend to ensure the valid and licit celebration of marriages. Canon 1085 § 2, in its turn, lays out that "even when the previous marriage was null and has been dissolved for some reason, it is not for this reason licit to contract another before the nullity or the dissolution of the previous one is stated legitimately and with certainty". On the other hand, in previous centuries, since the consent of the spouses was valid even if it was given without the presence of any witness, the second marriage would be valid or null depending on the effective death of the absent spouse. Although the second marriages could be illicit, they were valid when the absent party had died, as long as they had no news of him one way or the other. Therefore, the decretals of the Roman Pontiffs also regulated what behavior had to be adopted regarding those who, transgressing the prohibition, had contracted a second marriage.

In 1868, the SCHO issued the Instr. *Matrimonii vinculo*,[6] which constituted the *magna charta* in this matter up to the promulgation of the *CIC*/1917, and, according to a reasonable opinion, up to the year 1983, the date when the norm contained in this canon went into force. Indeed, "some authors hold that the legislator did not consider it opportune to establish in the Code of 1917 a new procedure for the declaration of presumed death, thanks precisely to the existence and validity of this instruction."[7] In the previously mentioned instruction, not only were the norms gathered that were previously in force, but eight rules were established and synthesized to become the process of the declaration of presumed death.[8]

4. LUCIUS III, Decretal *Dominus ac redemptor*, in *Enchiridion Familiae*..., cit., p. 113. Cf. *X* IV, 21, 2. The same doctrine can be found in CLEMENT III, Decretal *In praesentia*, yr. 1188, *X* IV, 1, 19.

5. Cf. M. SAID, "De processu praesumptae mortis coniugis," in *Dilexit iustitiam. Studia in honorem Aurelii Card. Sabattani* (Vatican City 1984), pp. 436 and 439.

6. Cf. SCHO, Instr. *Matrimonii vinculo*, in *AAS* 6 (1870/71), pp. 436–437.

7. R. MELLI, "Il processo...," cit., p. 219.

8. Regarding the relationship between these eight rules and the content of c. 1707, one can consult M. SAID, "De processu...," cit., pp. 444–449.

2. *The juridical nature of the process of declaration of presumed death*

Doctrine has emphasized that the legislator had decided to include the process of the declaration of the presumed death among the marriage processes, which is not mere coincidence. The celebration of a new marriage is a fundamental characteristic of the purpose of this process. One is dealing not only with declaring the death of a person, but doing it while envisioning a new marriage contracted by the surviving spouse. Therefore, it concerns a trial of a matrimonial nature, although indirectly, "the process of the presumed death of the absent spouse must be studied and incorporated within its juridical-pastoral context of a legitimate solution to the related problem of the cessation of the preceding marriage bond in relation to and in order to assure the licitness of the second marriage."[9]

Paragraph 1 establishes that the declaration of presumed death must be given by the diocesan bishop, either by a judicial sentence or an administrative decree.[10] The judicial route should be followed in more difficult situations, keeping in mind that § 3 prescribes that "in the doubtful and complicated cases the bishop must consult the Apostolic See;" in this case, one entrusts the question to the CDWDS. The necessity of recourse to the Apostolic See in complicated cases seems to make the possibility of recourse to the judicial route more improbable and unnecessary.

3. *The means of proof required in this type of process and the certitude necessary in order to issue the declaration of presumed death*

It is customary to come to the legal process for "presumed death," because the surviving spouse wants to contract a new marriage, for which the person will generally be directed to the pastor or to the local ordinary. So that this new marriage may be viable and licit, it is necessary that the death of the absent spouse be irrefutably evident, whether by means of an authentic document, ecclesiastical or civil, or by means of the aforementioned declaration of presumed death issued by the diocesan bishop. With regard to validity, one ought to keep in mind the preexistence of the previous bond, should it exist. If it continues in existence, the second marriage is null. If, however, it has been dissolved by death, then the second marriage is valid, although illicit. The impediment of the bond, in reality, is not ecclesiastical law but the divine-natural law, "in the law and in approved doctrine there is not a trace of an impediment of the bond of the ecclesiastical law, based upon the external celebration of the marriage and distinct

9. R. MELLI, "Il processo...," cit., p. 219.
10. Cf. M. SAID, "De processu...," cit., p. 450.

from the impediment of the divine law."[11] Therefore, the nullity of the subsequent marriage will only occur where the first bond is really still in existence, not when it concerns a marriage that is only apparently valid in the external forum.[12]

In conclusion, for second marriages to be celebrated, either an authentic document or the declaration of the diocesan bishop is necessary. It is insufficient to seek protection in a claimed "notoriety" of the death of the absent spouse, who, in the opinion of some authors before the *CIC*, would authorize the pastor to celebrate the second marriage without a need to go to the diocesan bishop.[13] Canon 1707 § 1 implicitly excludes this possibility.

Nonetheless, the legislator has left a wide margin for discretion to the diocesan bishop, so that he might conduct suitable investigations, which always must be positive (for example, witnesses, reputation, clues, as § 2 indicates in a non-exhaustive listing) and cannot consist in the simple absence of the spouse, no matter how protracted.

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11. STSA, Decreto, June 18, 1987, in *Comm.* (1987), pp. 15–18.
12. Regarding the impediment of the bond in the case of multiple marriages, one can consult T. DORAN, "L'impedimentum ligaminis (canon 1085 CIC)," in *Gli impedimenti al matrimonio canonico* (Vatican City 1989), pp. 173–176.
13. Cf. R. MELLI, "Il processo...," cit., p. 221.

TITULUS II
De causis ad sacrae ordinationis nullitatem declarandam

TITLE II
Cases for the Declaration of Nullity of Sacred Ordination

INTRODUCTION

Joseph Punderson

This second title of part III ("De quibusdam processibus specialibus") treats two special processes, one administrative and the other judicial, whose object is the declaration of the juridic fact (cf. c. 1400 § 1, 1°) of the nullity of sacred ordination.

1. *Doctrine*

The theological principle underlying this process is that sacred ordination, once validly received, can never be annulled, since it marks a person with an indelible character (cf. cc. 290 and 1008).

The grounds upon which the validity of ordination could be challenged are the following: *a)* the subject was not a validly baptized male (cf. cc. 849, 1024); *b)* the minister was not a consecrated bishop (cf. c. 1012); *c)* there was a substantial defect in the rite[1]; *d)* there was a defect of intention on the part of the ordaining minister; *e)* there was a defect of intention on the part of the subject. Factors that concern only the *licit* reception of sacred ordination (cf. cc. 1025 ss), e.g. the existence of an irregularity or impediment or a serious unsuitability on the part of the candidate, do not affect the validity of the ordination.

The causes presented normally involve an alleged defect of intention on the part of the subject. The canonical and theological doctrine concerning the intention required for the valid reception of ordination finds

1. Cf. c. 1009 § 2; PIUS XII, Ap. Const. *Sacramentum Ordinis*, no. 4, in *AAS* 40 (1948), pp. 6–7.

its closest parallel in the doctrine concerning the intention sufficient for the valid reception of the sacrament of baptism. Even though a person who has not attained the use of reason can be validly (though illicitly!) ordained,[2] a person who has reached the use of reason must have at least the habitual intention to receive the sacrament.[3] If there is no such intention, the ordination is not validly received. If there is such an habitual intention, the ordination is validly received, even if at the moment of ordination the person lacks the use of reason, e.g. through intoxication, epilepsy, and so forth. It must be noted that some defects of consent that might render a marriage consent invalid, e.g. a grave lack of discretion of judgment concerning the obligations that arise from ordination (cf. c. 1095, 2°), or the inability to assume those obligations (cf. 1095, 3°), would not render an ordination invalid, although they could be a just cause for seeking a dispensation (cf. cc. 290, 3° and 291).

When there is irresistible force (c. 125 § 1), such that the person undergoes ordination completely against his will, and in fact has no intention of being ordained, the ordination is not validly received. When, however, the person undergoes ordination moved by grave fear, unjustly inflicted, or as a result of fraud, the ordination itself is still valid (c. 125 § 2), although the grave fear or fraud could affect the binding force of the obligations arising from the ordination. This distinction between the validity of ordination itself and that of the obligations arising from ordination has long been a part of canonical doctrine (see below). In this respect, too, ordination differs from marriage (cf. cc. 1098, 1103).

If the subject simulates the intention to receive ordination itself, the sacrament is not validly received, but if he has the intention to receive ordination while simulating his intention to assume the obligation of celibacy arising from the ordination (cf. c. 1037), the ordination is still valid, and the obligation of celibacy is still considered binding, if not by the force of the promise, at least by force of the law of the Church.[4]

2. *Recent history*

In the *CIC*/1917 the parallel title was "Causes against sacred ordination" (cc. 1993–1998). These causes could be directed not only against the validity of the ordination itself but also against the validity of the obligations arising from sacred ordination (cf. cc. 211, 214, 1993, 1994 § 2, 1997 *CIC*/1917). In particular, such a process could examine the question of whether a person ordained under the pressure of severe fear, although validly ordained, lacked sufficient freedom to validly assume the obligations

2. Cf. BENEDICT XIV, Instr. *Eo quamvis*, May 4, 1745, in *CIC*/1917 *Fontes*, I, 890–903.
3. Cf. C. PARILLO, *SRR Dec* 20 (1928), pp. 348–349.
4. Cf. cc. 277 § 1, 1087; cf. c. PARRILLO, *SRR Dec* 20 (1928), pp. 349, 355.

arising from the ordination, and did not, once the source of the fear was removed, at least tacitly assume those obligations by the continued exercise of the order received (cf. c. 214 *CIC*/1917). Competence in such matters was divided between the SCHO and the SCDS (cf. c. 1993 § 1 *CIC*/1917). The competent congregation was to determine whether the cause should be decided through a disciplinary or a judicial process. If the former was decided on, the cause would normally be instructed in the diocese and then decided by the decree of the congregation, if the latter, the cause would be tried judicially by the tribunal to which it was remitted by the congregation.

In the first years after the *CIC*/1917 there were at least two causes of the nullity of sacred ordination heard in a judicial manner, one judged in first instance by a diocesan tribunal and heard in appeal at the Roman Rota in 1922,[5] and one judged at the Rota in both instances in 1928;[6] but the normal practice of the Holy See was to decide the causes in the disciplinary manner. This was made quite clear in the *Regulae Servandae* issued in 1931 by the SCDS for the instruction of such causes by the diocesan curia.[7] Apparently the practice of the Holy See remained very strict especially in regard to the declaration of the nullity of ordination, and most causes were probably resolved by recommending to the Supreme Pontiff that the man be returned to the lay state and dispensed at least *ad cautelam* from the obligations arising from the ordination.[8]

In the 1967 reform of the Roman Curia, the SCDS was given exclusive jurisdiction over causes against sacred ordination (*REU* 57), being able to decide itself questions of validity (of sacred ordination or the obligations) or to remit them to a competent tribunal.

In the preparation of the *CIC*, most discussion about the process against sacred ordination concerned the validity of the obligations arising from sacred ordination. The "*Coetus de Sacra Hierarchia*" proposed in 1967 that the prescriptions of cc. 1993–1998 *CIC*/1917 be revised and simplified and that the grounds for the invalidity of the obligations be expanded to include: *a)* the lack of due liberty for any grave cause; and *b)* any incurable illness that would render the man incapable of assuming or fulfilling the obligations arising from ordination.[9] In 1980 the "*Coetus de*

5. Cf. c. PRIOR, *SRR Dec* 13 (1922), pp. 263–272.

6. Cf. c. JULLIEN, *SRR Dec* 20 (1928), pp. 1–13; c. PARRILLO, ibid., pp. 347–355.

7. SCDS, Decr. *Ut locurum ordinarii* and *Regulae servandae* for the instruction on cases of nullity of sacred ordination in the diocese, June 9, 1931, *AAS* 23 (1931), pp. 457–492.

8. Cf. E. COLAGIOVANNI, "De dispensatione a coelibatu sacerdotali juxta novas normas," in *Monitor Ecclesiasticus*, 106 (1981), pp. 230–231.

9. Cf. *Comm.* 17 (1985), pp. 76–89, and the *Schema canonum libri II. De Populo Dei* (Vatican City 1977), c. 151; for an earlier proposal of this nature, cf. *Acta et Documenta Concilio Oecumenico Vaticano II Apparando; Series II (Praeparatoria); Volumen II. Acta Pontificiae Commissionis Centralis Praeparatoriae Concilii Oecumenici Vaticani II*, Pars IV (Vatican City 1968), pp. 408–409.

Populo Dei" decided to restrict the process to the question of the validity of ordination itself; the reason for the change is not clear and the report of the meeting shows some confusion between a judicial or administrative declaration of the invalidity of the obligations and a dispensation from those same obligations.[10] In the 1981 Plenary Session of the Code Commission 2 Cardinals proposed that the object of the process be extended again to include the nullity of the obligations because of grave fear. After discussion of the matter, however, 38 of the 48 members present decided to retain the text proposed by the "*Coetus de Populo Dei*."[11]

The first Schema on Procedures of 1976,[12] did not provide for any process against sacred ordination. In 1980, the "*Coetus de Processibus*" proposed new canons for a process against the validity of sacred ordination itself to replace canons 1993–1998, *CIC*/1917, carrying out the change proposed by the "*Coetus de Populo Dei*."[13] These proposed canons were incorporated unchanged into the *CIC* as cc. 1708–1712.

Thus the *CIC* does not provide for any process against the nullity of the obligations arising from sacred ordination. As long as the ordination has been validly received, the only solution for the cleric is to petition from the Holy Father a dispensation from those obligations (cf. cc. 290, 3° y 291). A dispensation from celibacy is not to be considered as a "right which the Church must recognize as belonging to all of her priests *without discrimination*,"[14] but the cleric "who should not have received ordination, namely because there was not due consideration of his freedom or responsibility,"[15] seeks a dispensation not simply as a favor (cf. cc. 219 and 1026). This is true especially when the invalidity of the obligations seems well-founded, according to the traditional canonical doctrine.

The only legislative development since the *CIC* has been the Ap. Const. *Pastor bonus*, which in art. 68 reaffirmed the exclusive competence of the CDWDS in this area, at least for the Latin Church (cf. art. 58 § 2). Since no new particular norms have been issued for such causes, the *Regulae servandae* of 1931 are still in use.[16] However, it must be remembered that: *a)* these norms must be adapted to the *CIC*; *b)* they are

10. Cf. *Comm.* 14 (1982), pp. 84–87; and *Schema Codicis Iuris Canonici* (Vatican City 1980), c. 265.
11. Cf. PCILT, *Acta et Documenta Pontificiae Commissionis Codici Iuris Canonici Recognoscendo: Congregatio Plenaria diebus 20–29 octobris 1981 habita* (Vatican City 1991), pp. 542–544; and c. 290,1° CIC
12. *Schema canonum de modo procedendi per tutela iurium seu de processibus* (Vatican City 1976).
13. Cf. *Comm.* 12 (1980), pp. 199–200, and *Schema Codicis Iuris Canonici* (Vatican City 1980), cc. 1664–1668.
14. Cf. SCDF, Litt. circ. *Per litteras*, October 14, 1980, no. 3, in *AAS* 72 (1980), p. 1133.
15. Ibid., no. 5, p. 1134.
16. Cf. R. MELLI, "La Congregazione del Culto Divino e della disciplina dei Sacramenti," in P.A. BONNET-C GULLO (Eds.), *La Curia Romana nella Cost. Ap. Pastor bonus* (Vatican City 1990), p. 274.

primarily addressed to the situation in which the cleric himself is the petitioner, and *c)* they are also addressed to causes against the nullity of the obligations arising from ordination. The Congregation still has at its disposal the Special Commission for the handling of causes of the nullity of sacred ordination, established by pontifical rescript of December 2,1929.[17]

17. Cf. *Annuario Pontificio 1994* (Vatican City 1994), p. 1169.

1708 **Validitatem sacrae ordinationis ius habent accusandi sive ipse clericus sive Ordinarius, cui clericus subest vel in cuius dioecesi ordinatus est.**

The right to impugn the validity of sacred ordination is held by the cleric himself, or by the Ordinary to whom the cleric is subject, or by the Ordinary in whose diocese he was ordained.

SOURCES: c. 1994; SCDS Regulae, 9 iun. 1931, 3 (*AAS* 23 [1931] 458); *SN* can. 502

CROSS REFERENCES: c. 290, 1°

COMMENTARY

Joseph Punderson

The cleric himself has the right to accuse the nullity of his own ordination since it is a question of his own status as a person in the church (see c. 1501), which he is entitled to choose freely (see cc. 219 and 1026). Furthermore, the cleric would normally bring such a cause in order to vindicate his right to marry (see cc. 221 § 1; 1058; 1400 § 1,1°), by disproving the existence of an apparent impediment (see c. 1087). Such a cleric would most likely base his petition on some defect of intention on his own part.

The ordinary, however, would bring such a petition because he suspects the invalidity of the ordination and does not want to re-ordain the cleric. His interest (see c. 1501) is founded in the need to protect the public good, especially from the invalid celebration of the sacraments.

For the meaning of "ordinary" see canon 134 § 1, together with canons 620 and 734. Although this term includes some who exercise only vicarious power, the libellus is better presented, if possible, by the diocesan bishop, provincial superior, etc., rather than by his vicar. The "ordinary to whom the cleric is subject" could be the ordinary of the diocese of incardination, a major superior in some cases, or even the ordinary of the place of domicile, quasi-domicile, or actual residence (cf. c. 107). This is true, for example, in the case of a dispensed or dismissed religious cleric who has not been incardinated in a diocese (cf. cc. 693 y 701).

The question has been raised whether the promoter of justice could present a libellus when the nullity of the ordination is public, by analogy with c. 1674, 2° (cf. c. 1971 § 1, 2° *CIC*/1917).[1] However, canon 1708

1. Regarding the *CIC*/1917, cf., e.g., F. CAPPELLO, *Summa iuris canonici*, III (Rome 1955), pp. 392–393; regarding the *CIC*, cf. L. DEL AMO, commentary on c. 1708, in *Pamplona Com.*

expressly limits this right to the cleric himself and the ordinary, and this is appropriate both because of the serious nature of the cause and because the libellus is to be presented to the Holy See, not the diocesan tribunal. The promoter of justice, however, can denounce the matter to the ordinary for his action and if the ordinary is unable or unwilling to act, the promoter of justice can even make a denunciation to the competent congregation.

Although the sacred orders are episcopate, presbyterate and diaconate (see c. 1009 § 1), it is usually a priest (presbyter) whose ordination is called into question through this process. A deacon would be less likely to use this process since he could obtain a dispensation from the obligations arising from sacred ordination for a less serious reason than a priest (see c. 290, 3°). An ordinary would be less likely to institute such an action against a deacon since the public good would suffer far more harm from the actions of a priest whose ordination is invalid than from an invalidly ordained deacon. The use of this process for a bishop is theoretically possible but in practice not admitted.

1709 **§ 1. Libellus mitti debet ad competentem Congregationem, quae decernet utrum causa ab ipsa Curiae Romanae Congregatione an a tribunali ab ea designato sit agenda.**

§ 2. Misso libello, clericus ordines exercere ipso iure vetatur.

§ 1. The petition must be sent to the competent Congregation, which will decide whether the case is to be determined by that Congregation of the Roman Curia, or by a tribunal designated by it.

§ 2. Once the petition has been sent, the cleric is by the law itself forbidden to exercise orders.

SOURCES: § 1: c 1993 § 1; COETUS S.R.E. CARD., Resp. II, 13 et 27 nov. 1922 (*AAS* 15 [1923] 39); SCDS Regulae, 9 iun. 1931, 1, 2, 4, 6 (*AAS* 23 [1931] 458–459); *SN* can. 501 § 1; *REU* 57
§ 2: c. 1997; *SN* can. 505

CROSS REFERENCES: —

COMMENTARY

Joseph Punderson

1. The competent congregation for the Latin Church is the CDWDS (*PB* 68). The *Regulae Servandae* of 1931[1] state that the petition: *a)* should be addressed directly to the Holy Father; *b)* give a full and exact account of the facts and state all the reasons that may support the petition; *c)* must be dated with the day, month and year and bear the name of the diocese of origin or of that where the petitioner is actually staying (no. 4 § 1). Furthermore, the *Regulae servandae* recommend that the petitioner submit his petition through his proper ordinary (no. 4 § 3), that is, of the diocese to which the cleric belongs or, in the case of a dismissed religious, the diocese of origin or domicile (no. 5), N.B. The *Regulae servandae* are drawn up to guide *local ordinaries* in the instruction of such cases. Normally a member of a clerical institute of pontifical right or a clerical society of apostolic life of pontifical right should submit the libellus through his major superior (see 134 § 1, 620, 734).

1. SCDS, Decr. *Ut locurum ordinarii* and *Regulae servandae* for the instruction on cases of nullity of sacred ordination in the diocese, June 9, 1931, *AAS* 23 (1931), pp. 457–492.

The Congregation will ask the ordinary to conduct a preliminary extrajudicial investigation in order to determine whether or not the cause has a probable foundation (*Regulae servandae* 6). If the petition lacks even a *fumus boni iuris*, the Congregation will reject it. The petitioner, within ten useful days of receiving the decree of rejection, can ask the Congregation to revoke (or emend) the decision.[2] Furthermore, if the petitioner alleges a violation of the law *in procedendo vel in decernendo*, he can, within thirty useful days, have recourse to the Apostolic Signatura against the decree of rejection.[3] In any case, by analogy with c. 1505 § 3, it seems that if the libellus was rejected for defects that can be corrected, the cleric can submit a new libellus.

If the Congregation accepts the libellus it will determine whether it will decide the matter itself through an administrative process, or whether it will designate an ordinary tribunal to decide the matter through a judicial process.

The ordinary practice of the Congregation is to decide the matter itself in the administrative manner, after delegating an ordinary to form a special tribunal to instruct the cause in the diocese.[4] However, for particular reasons the Congregation will on occasion instruct a cause entirely itself.[5] The *procedure* to be followed in the diocesan curia, as described in the *Regulae servandae*, follows a judicial model, with a judge instructor (the ordinary or his subdelegate), a defender of sacred ordination and a notary (nos. 7–29). At the end of the instruction, however, the judge instructor (in the *CIC* called an *auditor* in c. 1428) gives his *sentencia* (more properly a *votum*), about the merits of the cause, giving his reasons both in law and in fact (no. 70 § 2). This *votum* does not have the force of a judicial sentence but is to be sent to the Congregation, together with the acts of the cause and process, as well as the *votum* of the ordinary if he did not himself act as judge instructor (no. 70 §§ 2 and 4). The Congregation then makes the final decision in an administrative manner according to its own procedures.

If the Congregation decides by administrative decree that the ordination received is invalid, it has been juridically established that the man is not a cleric (see c. 290, 1°), and has neither the rights nor the obligations of the clerical state (see c. 292). As indicated in c. 291, no dispensation from celibacy is required in this case for the man to contract a valid marriage since the putative source of the impediment (see c. 1087) has been declared null. The juridic effects of such a decision are discussed in greater detail in the commentary on c. 1712.

2. RGCR, 134 § 2, 135 § 1
3. Ibid., 135 § 2, 136 § 4, *PB* 123 § 1.
4. Cf. *L'Attività della Santa Sede 1986* (Vatican City 1987), p. 1102.
5. Cf. *L'Attività della Santa Sede 1988* (Vatican City 1989), p. 1132.

If the Congregation decides that the nullity of the ordination has not been proven, it would then decide whether or not to recommend to the Holy Father a dispensation from the obligations of sacred ordination, according to its competence.[6]

2. Canon 1997, *CIC*/1917, stated that the cleric should be prohibited to exercise orders *ad cautelam* but now this prohibition is imposed *ipso iure* for the public good since the validity of some of the sacraments celebrated would be in question. Certainly if the cleric himself believes that the orders are invalid he is bound in conscience not to exercise them, even before he submits a libellus. If the libellus has been presented by the ordinary rather than by the cleric, this fact and the consequent *vetitum* should be communicated to the cleric. In practice, even before a libellus is submitted, the ordinary should forbid by precept (see c. 49) the exercise of orders *ad cautelam* as soon as he has any founded suspicion that the ordination might be invalid. In such a case, as in the case of the prohibition by the law itself, the ordinary can enforce the prohibition with the threat of a penalty (see c. 1319).

6. Cf. "Carta del Cardenal Secretario de Estado," February 8, 1989, in *Notitiae* 25 (1989), p. 485.

1710 **Si Congregatio causam ad tribunal remiserit, serventur, nisi rei natura obstet, canones de iudiciis in genere et de iudicio contentioso ordinario, salvis praescriptis huius tituli.**

If the Congregation remits the case to a tribunal, the canons concerning trials in general and the ordinary contentious trial are to be observed, unless the nature of the matter requires otherwise and without prejudice to the provisions of this title.

SOURCES: cc. 1993 § 2, 1995; SCDS Regulae, 9 iun. 1931, 7–70 (*AAS* 23 [1931] 459–472); *SN* cann. 501 § 2, 503

CROSS REFERENCES: c. 1691

COMMENTARY

Joseph Punderson

1. *The designated tribunal*

If the Congregation remits the cause to a designated tribunal, the cause is to be tried and decided by an exercise of judicial power. Without this action of the Congregation, an ordinary tribunal is absolutely incompetent by reason of the matter. Under the *CIC*/1917 (c. 1993 § 2), the Congregation was to commit the cause to the tribunal of the cleric's proper diocese at the time of ordination or, in a cause of an alleged defect in the rite, the diocese in which the cleric was ordained. In the present law the Congregation enjoys more freedom to select the tribunal, although the tribunals specified by the prior law would in most cases be the most appropriate. From the text of cc. 1709 and 1710, which speak of *remitting* a cause to a *designated* tribunal, it is clear that the Congregation does not *delegate* the tribunal to try the cause (as it delegates a bishop to instruct a cause in the administrative process), but *commits* the cause for trial to the tribunal, as is explicitly stated in regard to the Roman Rota (see c. 1444 § 2). In fact, the Congregation per se does not enjoy judicial power and so cannot form a delegated tribunal to hear a cause in a judicial manner. If the cause is committed to a diocesan tribunal, appeal can be made to the normal appellate tribunal (see c. 1438) or the Roman Rota (see c. 1444 § 1, 1°). When the cause is committed to the Roman Rota in first instance, it is to be tried in second and further instance by that same Apostolic Tribunal (see c. 1444 § 2).

2. *The process that must be followed*

It is clear that this is a contentious cause (see c. 1425 § 1,1°), not a criminal cause, even when it is brought by the ordinary against the will of the cleric. Canon 1710 is not as specific as the parallel c. 1691 regarding matrimonial causes but, by specifying that the tribunal is to follow the norms for the ordinary contentious process (*Liber* VII, pt. II, secc. I) the canon excludes the use of the oral contentious process (sec. II; see c. 1656). Furthermore there is no doubt that the tribunal is to follow the norms for causes of the status of persons and for causes regarding the public good.

The special norms for causes involving the status of persons provide that *actio* in such a cause is never extinguished by prescription (see c. 1492 § 1), that such a cause never becomes *res iudicata* (see c. 1643), that a *nova causae propositio* can be sought at any time for new and grave proofs or arguments (see c. 1644 § 1). They provide also that the Apostolic Signatura hears recourses against a decision by which the Roman Rota has refused to admit such a cause to a new examination (see *PB* 122, 2°).

Among the norms regarding the public good are cc. 1430 and 1431 § 1 concerning the promoter of justice. Since the *CIC* does not specifically require the participation of the promoter of justice in all such causes (as it does for causes of separation, see c. 1696), it is up to the ordinary, or the judge, to decide whether or not the participation of the promoter of justice is required.[1]

Other relevant norms concerning causes involving the public good include:

— c. 1452 § 1: once the cause has been legitimately introduced, the judge can and must proceed ex officio;

— c. 1481 § 3: the judge must ex officio appoint a defender for a party who lacks one;

— c. 1532: the judge is to administer an oath to the party;

— c. 1536 § 2: concerning the probative force to be given to the judicial confession or judicial declaration of the party (and here c. 1679 should be applied as well);

— c. 1598 § 1: the judge may exclude *some* act from publication in order to avoid very serious evils, provided that the right of defense remains intact.

Canon 1425 § 1, 1° explicitly requires that such a cause be judged by three judges, and the bishop could entrust the cause to five judges (see c. 1425 § 2). Even though an exception is permitted by c. 1425 § 4, it is

1. Cf. c. PALESTRO, April 28, 1993, in *Monitor Ecclesiasticus* 118 (1993), pp. 408–417.

unlikely that such a cause would be entrusted to a tribunal that has only a single judge available. Since c. 483 § 2 prescribes that the notary be a priest in causes in which the reputation of priest could be called into question, *a fortiori* it seems proper that all the judges in the cause be priests. Furthermore, given the sensitive nature of the case, the judges would be obliged by office to secrecy (see c. 1455 § 1), and it would be appropriate that an oath of secrecy be imposed on all others involved in the cause (c. 1455 § 3; cf. *Regulae servandae*,[2] 11, 15 § 3, 37).

Even though the specific reference of c. 1995, *CIC*/1917, to the matrimonial process has been dropped, several of the specific prescriptions of the process for the nullity of marriage are still appropriate in causes of the nullity of sacred ordination, such as c. 1679 (already mentioned) and c. 1680 on the use of an expert, if it is asserted that the person lacked the use of reason.

If a sentence is issued in favor of the ordination, the aggrieved cleric can appeal according to the norm of law, and likewise, the defender of the bond if the sentence is in favor of the invalidity of ordination. Due to the evident lack of grievance (*gravamen*), the defender of the bond can never appeal against a sentence in favor of the ordination nor the cleric against a sentence of invalidity, if he wants to obtain such a declaration.

It should be noted that, although the defender of the bond has the right to appeal against a sentence in favor of the invalidity of ordination, he has no *obligation* to do so (see c. 1711 with cc. 1628 and 1683, § 1). If he should not propose an appeal against such a sentence, the cleric who wants the declaration of the nullity of ordination, and therefore cannot propose an appeal in the proper sense, would have the right to insist that the cause be heard by the tribunal of appeal, since a single decision in favor of the nullity of ordination cannot be executed unless it is confirmed in a higher instance (see c. 1712). It would appear logical, also by a partial analogy with c. 1682 § 1, that in such a case the sentence and the acts of the trial should be transmitted ex officio to the tribunal of appeal.

2. SCDS, Decr. *Ut locorum ordinarii* and *Regulae servandae* for the instruction on cases of nullity of sacred ordination in the diocese, June 9, 1931, in *AAS* 23 (1931), pp. 457–492.

1711 In his causis defensor vinculi iisdem gaudet iuribus iisdemque tenetur officiis, quibus defensor vinculi matrimonialis.

In these cases the defender of the bond has the same rights and is bound by the same duties as the defender of the bond of marriage.

SOURCES: c. 1996; SCDS Regulae, 9 iun.1931, 18–20 (*AAS* 23 [1931] 462); *SN* can. 504

CROSS REFERENCES: cc. 1432–1436, 1447, 1448 § 2, 1449 § 4, 1451 § 1, 1533, 1561, 1603 § 3, 1606, 1626 § 1, 1628, 1636 § 2, 1678 § 1

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It must be remembered that the office of defender of the bond is to defend the bond of sacred ordination as well as the bond of matrimony (see c. 1432). In each case this minister acts for the public good in defending a sacred reality that enjoys the favor of the law (see c. 124 § 2; *Regulae servandae*,[1] 46 § 2, 62 § 1), proposing and expounding all that can reasonably be argued in favor of the bond of sacred ordination.

In the observations on the 1980 *Schema*, one member of the commission wanted to require that in a cause against sacred ordination the defender be a priest, or in the cause of a deacon, at least a deacon since it was "not expedient" that in such a cause a layperson *(laicus)* act in this capacity. The consultors did not agree since the "dignity of sacred ordination was not being called into question."[2] However, as with the judges, it is more appropriate that the defender be a priest by analogy with c. 483 § 2.[3]

1. SCDS, Decr. *Ut locorum ordinarii* and *Regulae servandae* for the instruction on cases of nullity of sacred ordination in the diocese, June 9, 1931, in *AAS* 23 (1931), pp. 457–492.
2. Cf. *Comm.* 16 (1984), p. 77.
3. Cf. Decision of the Apostolic Signatura, June 11, 1968, in *Apollinaris*, 43 (1970), pp. 454–456, in the context of the former legislation.

1712 **Post secundam sententiam, quae nullitatem sacrae ordinationis confirmavit, clericus omnia iura statui clericali propria amittit et ab omnibus obligationibus liberatur.**

After a second judgement confirming the nullity of the sacred ordination, the cleric loses all rights proper to the clerical state and is freed from all its obligations.

SOURCES: c. 1998; *SN* can. 506

CROSS REFERENCES: cc. 290,1°, 291, 292, 1643, 1644, 1684 § 1

COMMENTARY

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When this canon was proposed to the "*Coetus de Processibus*" in 1980, one consultor objected that it was incorrect to speak of the *loss* of rights that the cleric never enjoyed and the *liberation* from obligations to which he was never bound. The other consultors, however, maintained that the wording was correct, since such a person truly had enjoyed the status of cleric, although from a putative title.[1]

Properly speaking, the effect of the two conforming judicial sentences, as of the administrative decree of the competent congregation, is to establish juridically that the basis for the clerical state (see c. 266 § 1), never existed and therefore the subject has neither the rights nor the obligations of the clerical state. However, one cannot deny that before this moment, that is, as long as the ordination was presumed to be valid, the man was considered a cleric and was afforded the rights of that state and expected to fulfill its obligations. In this sense he now loses the clerical state and its rights and is freed from its obligations (see cc. 290,1° and 292). Nonetheless, although it would not have been licit for him to contract marriage (see c. 277 § 1), if he had somehow contracted marriage according to the canonical form before his freedom from the impediment of sacred orders (see c. 1087) had been legitimately demonstrated (see c. 1066), the marriage would still be considered valid (an analogy is found in c. 1085 § 2). *A fortiori*, after the declaration of the nullity of ordination, no dispensation from the obligation of celibacy is needed, and this is the meaning of the phrase *praeter casus de quibus in* c. 290, no. 1 in c. 291. It

1. Cf. *Comm.* 12 (1980), pp. 199–200.

should be noted that the basis for the matrimonial impediment is not the clerical state but sacred ordination itself.

The provisions of cc. 1682 § 2 y 1684 § 1, by which a sentence in favor of the nullity of marriage can be confirmed by *decree*, cannot be applied by analogy to this case, in which two conforming *sentences* are explicitly required.

As in the case of two conforming decisions declaring the nullity of marriage, the judicial vicar should notify the local ordinary of the place of baptism so that the pertinent information could be entered in the baptismal record (see cc. 1685, 1054, 535 § 2). The ordinary of the place of ordination should also be notified so that information can be recorded in the book of ordinations (see c. 1053 § 1).

Furthermore, should the process reveal a grave difficulty in the man that would impede a valid marriage, a *vetitum* against a possible marriage could be imposed by the ordinary (cf. c. 1077 § 1), and (by analogy with cc. 1684 § 1 and 1685) by the judge.

TITULUS III
De modis evitandi iudicia

TITLE III
Ways of Avoiding Trials

INTRODUCTION

Rafael Rodríguez-Ocaña

1. The notion of conflict or litigation belongs largely to the procedural sphere, to the extent that the object of the process is fundamentally the *litis*, the conflict between the parties. In contrast, a more modern conception of procedural law maintains that the essential point of the process, that which explains in its entirety the series of acts leading toward the attainment of the judicial solution, is the claim. This change of orientation is important for the matter this title of the *CIC* regulates.

In effect, when the legislator proceeds to equip the canonical arrangement with juridical instruments that serve to avoid trials, he does so from a positive point of view, one that is not deprecatory of the procedural institutions that imply nothing negative toward possible controversies that have risen among the faithful. On the contrary, what the legislator seeks to do is to avoid these controversies, and the first step to accomplish this is not necessarily the lawsuit, but other alternatives —reconciliation or arbitration—that, different from the lawsuit, limit the solution of the juridical differences to the consensual and the private sphere. Overall, what it aims at is the resolution of the opposing positions, brought to light at the outset of the conflict, without prejudice to justice, and without having to extend into the domain of public law. The implication is that the resolution would otherwise depend upon the jurisdictional bodies of the Church and the complex activity of the *jus cogens*, which those bodies develop for the resolving of litigations. Moreover, this course implies publicity and time until one arrives at a solution—whether one likes it or not.

At least this orientation seems to be adopted by c. 1446, at the beginning of the title "The Discipline to be observed in Tribunals," which means that the norm is applicable to whatever judicial procedure is being carried out. Canon 1446 § 1 contains a moral recommendation directed both to the faithful and to the bishops. Insofar as is possible, it asks them to avoid

lawsuits with diligence, without prejudice to justice. It also asks them to arrive at a peaceful settlement *quam primum.* Thus, the recommendation possesses a certain urgency, since it implicitly requests that they should work out the necessary means of converting a conflict into a peaceful situation. It even points out to the judge the opportunity of offering appropriate solutions, among which are the possibility of approaching persons who exercise the office of mediators (cf. c. 1446 § 2), and, if we are confronted with personal rights, the compromise or judgment by arbitration (cf. c. 1446 § 3), immediately afterwards, referring to the canons contained in the present title.

2. Following the apostolic injunction, adopted afterwards by the Fathers, and to avoid lawsuits and the *strepitus iudicii*, the *Ius decretalium* regulated in detail the ways of avoiding lawsuits, bearing in mind the prevailing discipline in Roman law.[1] Afterwards, the *CIC*/1917 gathered in Title XVIII the ways to prevent "the contentious lawsuit." It was the first of the titles of part I, section II ("The special norms to be observed in certain and determined judgments") of the section *De processibus.* The regulation, although included under the same title, was divided into two chapters: the first dedicated to settlement (cc. 1925–1928), and the second to compromise through arbitration (cc. 1929–1932). Within that same section were also found the regulatory norms of the "criminal trial" (title XIX), marriage cases (title XX), and cases against sacred ordination (title XXI). This method of classification was criticized by learned teaching.[2]

The *CIC*, relative to its systematization, is beholden to the *CIC*/1917, since, under the heading "Certain special trials," it contains three distinct titles: marriage trials (title I), cases for declaring the nullity of sacred ordination (title II) and the ways of preventing lawsuits (title III). It separated the penal process from the group, to which part IV of book VII was completely devoted. It is also necessary to point out that, while they presented a different treatment for settlement and for compromise through arbitration in eight canons in the 1917 Code, the *CIC* now chooses to have a combined treatment of both figures in four canons.

The systematic-comparative description leads to the following conclusions.

a) For the first time in the organization of the Code, matrimonial trials for nullity are clearly distinguished from penal trials, so that the Code advances one more step in its separate treatment of the marriage trial. Actually, it is well-known that a strict relationship existed between both types of processes —and even continues now in some aspects—, due to

1. Cf. A. JULIEN, "Evolutio historica compromissi in arbitros in iure canonico," in *Apollinaris* 10 (1937), pp. 205–206; L. DE LUCA, *La transazione nel diritto canonico. Contributo alla dottrina canonistica dei contratti* (Rome 1942), pp. 15ff; P.A. D'AVACK, "Arbitrato," in *Enciclopedia del Diritto*, II (Milan 1958), pp. 958–959.

2. Cf. L. DE LUCA, *La transazione nell diritto...*, cit., pp. 219–220.

the fact that the Church took as a basis for creating the marriage process the figure of the Roman criminal case.[3] Its precision is of interest in confirming the contentious nature of declarative trials of marriage nullity.

b) The canonical legislator continues to present ways of avoiding lawsuits under one heading ("Certain special procedures") which do not fit with the negotiable nature of settlement or compromise through arbitration. It is obvious that neither of these ways can be qualified as a special process, because both are contracts between the parties. In addition, although the judge might intervene in some types of settlement, this does not imply that we are before a special process the purpose of which is to avoid trial. To this it must be added, in the two special processes which that same rubric presents (marriage and sacred orders), the possibility of resolving the conflict through settlement or through compromise (cf. c. 1715 § 1) is forbidden.

c) One can add that the *CIC* lacks a unified treatment of the different ways that legitimately terminate a process that has already begun or which is about to begin. All those processes have the same purpose: to avoid or end the controversies that are on the verge of litigation. Some are of a negotiating nature, while others are more procedurally oriented. The first are efficacious before beginning the litigation, and, once the litigation has been started, the second are. To sum up, I am referring to conciliation (cc. 1446, 1659 and 1676), settlement and compromises through arbitration (cc. 1713–1716), on one hand; and, on the other hand, I am referring to the definitive crisis of the process, which the tone of c. 1517, in its generality, authorizes to form a part of the "other ways established through the law" to put an end to the instance, that it is to say, to the process.

Among the decisive moments of the process, we find the following in the *CIC*: Expiration through the lack of procedural initiative (cc. 1520–1523); the waiving of a right, given the name by the *CIC* as the renunciation of the instance (cc. 1524, 1525); and the renunciation of the action, mentioned by c. 1485, to prescribe the need of a special mandate so that the promoter of justice can request it.

Therefore, a process will be able to be cut short by recurring to reconciliation (even in cases of marriage nullity, in accordance with cc. 1676 and 1695), by the contract of settlement in its different and legitimate categories, or by mutual agreement to have recourse to arbitration. However, the parties can also bring about its expiration, or they can renounce it — this applies only to the petitioner both as to the instance and to the legal action. The overall result in all of those cases is the purpose of the process.

Consequently, the systematic option chosen by the *CIC* —inherited from the imperfections of what was adopted from the *CIC*/1917— does not appear adequate from a viewpoint of technical procedure. It would

3. Cf. A. ESMEIN, *Le mariage en droit canonique* (Paris 1891), p. 405.

have been more suitable to combine the regulation of the nature of the three ways to negotiate the avoidance of lawsuits (reconciliation, settlement and compromise through arbitration), and to put that regulation under the heading "The Discipline to be observed in Tribunals," since it is there that we meet the exhortation to avoid conflicts among the people of God. In addition, given that the phenomena of the definitive crisis of the process seeks the same objective, there should have been a reference to the canons that regulate them, since they do not allow opportune means to reach a reasonable solution to the controversy by common accord.

3. In the *CCEO*, the presentation of the ways of avoiding lawsuits, though without being very satisfactory, is more in accord with the ideas mentioned above. Indeed, the regulation of the settlement and of the compromise through arbitration is situated within the title XXIV, *De iudiciis in genere* in the last chapter, *De modis evitandi iudicia*. Therefore, their consideration as special processes disappears. However, it lacks a reference to conciliation and the phenomena of the definitive crucial moment of the process. As a general requirement, conciliation is taken up in c. 1103 in the *CCEO*, the equivalent to c. 1446 of the *CIC*. The phenomena of crisis are regulated in cc. 1199–1206 of the *CCEO*, with the exception of the renunciation of the action, which is merely mentioned in c. 1143 of the *CCEO*. Thus, both Codes are very similar under these aspects.

Finally, it is appropriate to point out that the concrete regulation of the settlement and of compromise is distinct in the two Codes. While the *CIC* dedicates four canons to the matter, and the entire regulation is strongly influenced by the principle of the autonomy of the parties (see the commentary for c. 1714), the *CCEO* consigns the regulation of the settlement to civil law (c. 1164 *CCEO*) and to write a system of norms for the compromise through arbitration in separate articles (cc. 1168–1184, *CCEO*).

4. The comparison between both Codes supports the idea that, in the Latin Code, the legislator refrains from regulating the methods of avoiding lawsuits, especially referring to arbitration, being content to defer this matter to the principle of the autonomy of the parties, and in its absence to the law of the bishops' conference, or to the civil law. This idea perhaps has played an important part in the basis of the bishops' conferences (see the commentaries to the Canons of the present title), but only one conference has regulated through law the reference to arbitration, and the others which refer to this theme —only a total of nine— decided either not to issue any norms or to "canonize" the civil law.

Therefore, this state of the question presents an arid landscape insofar as the canonical regulation about avoiding lawsuits is concerned. That means that, of the three forms foreseen by c. 1714, there are in fact only two that are operative. These are embodied in the norms provided by the parties and provided in the civil law, because only one bishops' conference has produced a particular law corresponding to the situation. Was

this the result or the objective sought by the legislator for the Latin Code? The answer to that question, from one point of view of the political legislator, cannot be other than negative. It is certain that there are some underutilized canonical institutions in relation to ecclesiastical juridical relationships, despite the call that the legislator makes for the avoidance of litigation in the church. One reason for the neglect of this practice is the lack of attention that particular legislators have given to the ways of avoiding lawsuits. Ironically, such a lack of attention precisely in the places where they must develop their efficacy is logical since it can be interpreted as an almost generalized non-application in the ecclesiastical tribunals.

There are two implications stemming from the internal compatibility of the distinct canons of the *CIC*. On the one hand, immediate attention is taken so as "to avoid lawsuits in so far as possible among the People of God and so that they settle peacefully as soon as possible" (c. 1446 § 1). On the other hand, painstaking attention should be given to the methods of carrying out that objective (cf. c. 1446 § 3). Therefore, the notion that maintains that, in the Latin Code, the legislator does not intend to give direction as to the manner of avoiding lawsuits is not capable of being sustained. That is so if one keeps in mind the implications of the internal compatibility of the canonical system.

In fact, among the distinct choices in the *CIC* that were presented, the legislator has favored those most inclined by nature to help avoid litigations in the church. We can qualify that interpretation as technically correct if one keeps in mind that we are facing subjects the juridical regulation of which is different and depends upon the juridical area —Anglo-Saxon, Latin, etc.— within which that regulation pertains. Conscious of this diversity, the *CIC* makes a choice on behalf of the interested parties, the bishops' conference or the civil law, so they may establish norms to be observed in their settlements.

With that regulation, the first place goes to the principle of autonomy, which is logical because the parties are the ones who must come to an agreement to settle their disagreements peacefully. There is also the corresponding mandate that is given —in this case to the bishops' conferences— so that their particular Law might regulate in detail the different agreements. This law is to be constructed in such a form that the parties may find in it a canonical guide for everything the conferences have hitherto not begun to issue norms. Consequently, it is important that bishops' conferences exercise this function, in remembering that there exists a real danger that the systematic recourse to that which the civil law has established in these cases can be converted into a means to evade canonical questions which legitimately pertain to the competence of the Church, so that these questions can be brought into the bounds of the civil jurisdiction. This procedure is possible because the civil procedures have been followed which have been derived from their "canonization."

Finally, if one wants this topic to work effectively in the center of ecclesial society, to help toward the settlement of conflicts and be imbued with the spirit of the Gospel (Mt. 18:15–16), the bishops' conferences ought to give the methods to avoid litigations in the Church the attention which they deserve, and proceed to produce a detailed regulation, in accordance with the mandate of the universal legislator.

1713 **Ad evitandas iudiciales contentiones transactio seu reconciliatio utiliter adhibetur, aut controversia iudicio unius vel plurium arbitrorum committi potest.**

In order to avoid judicial disputes, settlement or reconciliation can profitably be adopted, or the controversy can be submitted to the judgement of one or more arbiters.

SOURCES: cc. 1925, 1929; *SN* cann. 94, 98

CROSS REFERENCES: cc. 1400 § 1, 1401, 1446, 1714, 1715

COMMENTARY

Rafael Rodríguez-Ocaña

1. *Preliminary questions*

Before analyzing each one of the methods for avoiding judicial contentions contained in c. 1713, one must treat two questions that the wording of the norm presents.

a) The first question relates to the meaning of the phrase *judicial contentions*, or, according to the Spanish translation, "judicial litigations." "Judicial controversies" would have been preferable because the term "litigations," from *litis*, is sufficiently expressive in reference to the process. *Judicial contentions* refers to the controversies which, having been engendered in the world of juridical relationships within the Church, can eventually extend to the canonical trial, and therefore be susceptible of judgment by the tribunals of justice. Given that the canon does not specify anything more —the canons that follow will, of course, do so— the possible controversies, if they are qualified as *judicial*, must:

— be contained within the suppositions of fact of c. 1400 § 1, the first of book VII, which indicates what is "the activity which is deemed contentious in the canonical forum, resembling that which is derived from the punitive function."[1] Therefore, controversies that have arisen within the administrative structure are exempt and cannot be brought to the administrative tribunals. It is necessary to point out that if a determined

1. C. DE DIEGO-LORA, commentary on c. 1400, in *CIC Pamplona*.

controversy is not susceptible to being the object of a lawsuit, it cannot be resolved through a settlement or a compromise as ways of avoiding trials.

— pertain only to the jurisdictional scope of the church, which is circumscribed within its external boundaries by c. 1401. Every matter that concerns itself with questions different from those indicated in c. 1401 remains outside of the field of canonical settlement and canonical compromise through arbitration. Therefore, its proper place is civil law. In short, *judicial contentions* must deal with a canonical matter, a matter submitted to ecclesiastical jurisdiction.

The scope of their ability to implement these methods of settling canonical disputes is further reduced, since the legislator will be opposed to the settlement and the compromise of rights that pertain to the public ecclesiastical interest (see commentary on c. 1715).

b) The second question is whether the methods that c. 1713 prescribes for the extrajudicial resolution of canonical litigation are two or three. In principle, it is clear that the commitment to arbitration is one of those methods: *aut controversia iudcio unius vel plurium arbitrorum committi potest*. However, when the canon says that it is useful to use "settlement or reconciliation," a doubt arises as to whether it is referring to two distinct negotiable types —settlement and the reconciliation— or whether settlement and reconciliation are identical. Any inclination toward one understanding or the other depends upon the stress one gives to the conjunction *or* in the canon. If we are facing a disjunctive conjunction, settlement and reconciliation are two different methods; if its meaning is declarative or explicative, both are the same thing.

Learned teaching has not approached the topic quite so directly. As long as there are authors who, without more considerations, sustain the identity between *reconciliatio* and the conciliation prior to the process, intended to help the parties to reach an agreement,[2] the implication is that c. 1713 has drawn up three separate figures —settlement, reconciliation or conciliation and compromise. Either these authors do not distinguish or connect them,[3] or, they fail to relate the methods prescribed in it with c. 1446, which expressly treats conciliation.[4]

The question has a certain importance since it refers to the concept of settlement, which would leave off being tied to its classical and strict idea —such as has been maintained since the *Prima Compilatio Antiqua*,

2. L. MADERO, commentary on c. 1713, in *CIC Pamplona*.

3. Cf. G.P. VALSECCHI, "I processi," in *La normativa del nuovo Codice*, 2nd ed. (Brescia 1985), p. 398.

4. Cf. Z. GROCHOLEWSKI, commentaries on tit. III: "I modi per evitare i giudizi, y al c. 1713," in *Commento al Codice di Diritto Canonico* (Rome 1985), pp. 980–981; J.L. ACEBAL, commentary on c. 1713, in *CIC Salamanca*; L. CHIAPPETTA, commentaries to cc. 1713–1716, in *Il Codice di Diritto Canonico. Commento giuridico pastorale*, II (Naples1988), p. 767.

where we meet for the first time a title *De transactionibus*[5]— to pass to a broader concept, which would contain distinct formulas involving reconciliation between the parties.

On the other hand, the relationship between the methods selected by c. 1713 and the conciliation does not make itself obvious. The reason is that, through the intervention of the judge before the parties, in accord with what is prescribed by c. 1446, he can, in the act of conciliation, arrive at an agreement between the different sides which, when made formal, terminates as a contract of settlement, thus putting an end to the conflict. Consequently, once the judge takes note of the question, the conciliation is presented as the first act in the procedural order. When possible, the attempt is made here to reconcile the parties and to find adequate methods (depending upon the nature of the object in litigation) to arrive at a peaceful agreement without any need to go to court. In principle, the judge plays an active role in finding an equitable solution, suggesting even recourse to third parties as mediators between the parties.[6] The juridical formalization that can acquire a finalized accord stems from the choice of one of the methods foreseen as preventing litigations, to produce one of the decisive moments that terminate the trial, if it has already started. Conciliation, as such a procedural act, is regulated by canons 1446 (the general norm relative to every class of trials), 1659 (conciliation in the oral process), 1676 (conciliation in declarative trials of marriage nullity) and 1695 (conciliation in cases of separation).

2. *The settlement*

a) Concept

In the strict and classical sense, the settlement is a synallagmatic, or bilateral, contract about a doubtful object (*res dubia*). Through this contract, the parties, by giving, promising or retaining something, evade the provocation of a lawsuit or put an end to one already begun. The canonical doctrine has added to this Roman law one extra notation since the time of the Decretals as a necessary requirement for the settlement, the *lis incerta*. It is insufficient for the object to be doubtful; in addition, it should specify exactly the existence of a *litis*, either actually taking place or only probable.[7] These characteristics, especially the onerousness and

5. Cf. L. DE LUCA, *La transazione nel diritto canonico. Contributo alla dottrina canonistica dei contratti* (Rome 1942), p. 30.
6. For other questions on conciliation, see the commentaries on cc. 1446, 1659, 1676 and 1695.
7. Cf. L. DE LUCA, *La transazione*..., cit., p. 43.

the *lis incerta*, differentiate the settlement from related contracts such as the bequest and the exchange, respectively.[8]

Given that the *CIC* identifies the concepts of settlement and reconciliation and gives them a single treatment in c. 1713, when one mentions the term "settlement" in cc. 1714 and 1715, it must be understood in a broader sense than was previously taught in canonical doctrine. Settlement would include both the classic concept and any other type of contract or agreement of intents that would bring with it the reconciliation of the interested parties. This would take place even though there were no existing reciprocity of benefits and even independently of the predictable content —which can range from the pardon of the debt to the giving of a guarantee, or it can consist in a renunciation or a simple donation, etc.— which might be drawn up in an agreement. This concept of settlement is possible to sustain in the present canonical system, given the wide scope and the great liberty which c. 1714 espouses in establishing its preference for norms through which the settlement must be regulated.

There is an inference that the present legislator gives more importance (cf. c. 1446) to reaching an equitable accord between the parties than to the particular content of the solution that was attained. This solution, if it produces reconciliation and is put into a contractual form, is that which comes to be called a canonical settlement, subject to the arrangement that is governed by the law of the Church.

b) Classes

The principle division made within the settlement is the difference between the judicial settlement and the extrajudicial or conventional settlement. The judicial settlement is produced by the mutual will of the parties directed towards ending the process already begun, eliminating the situation of heated confrontation by means of acts of forgiveness, of assignment, of transfers or of juridical positions. The characteristic of a canonical settlement is that the accord is achieved *coram judice*, normally by means of an approbatory decree given by the judge or the collegial body by means of the compromise by the parties. This class of settlement can always be given *in quacumque litis parte* and when the sentence has not attained the effect of a finalized judgment. Therefore, it can take place even when the dictated sentence is pending because of its being challenged.[9] On the contrary, with an extrajudicial settlement, the agreement is produced outside of a trial and a process would have only an indirect influence upon it.

8. Cf. F. DELLA ROCCA, *Instituciones de Derecho Procesal Canónico* (Buenos Aires 1950), p. 396.
9. Cf. L. DE LUCA, *La transazione*..., cit., p. 137.

3. *Commitment to arbitration and the judgment of the arbiters*

a) Concept

The commitment to arbitration and the judgment of the arbiters are two distinct acts that constitute the institution of arbitration. *The commitment to arbitration* is the contract through which the parties agree to submit their arguments to the decision of third parties called arbitrators and designated by them, with the purpose of avoiding the *contentiones iudiciales. Trial by arbitration* is the procedure and the resolutions that follow the arbitrators designated in the agreement to decide the controversy. The definition of the controversy given by the arbitrators is the arbitral decision.

The difference between arbitration and settlement is two-fold. In the first place, there is a difference on the subjective level, since the resolution of the controversy in arbitration is left in the hands of a third party, whereas, it is the parties themselves who agree to put an end to their differences in the case of a settlement. In the second place, a clear differentiation shows up between both figures in the way in which they evade resorting to a trial. Actually, while arbitration develops on a two-tiered level (commitment to arbitration and the subsequent judgment) to accomplish its purpose, the contract of settlement nevertheless appears as a substitute for the decision of the judge.

b) Classes

In the canonical field, there has been a distinction made between necessary arbitration and voluntary arbitration, and between arbitration by law and arbitration by equity.

Necessary arbitration is imposed, by law, upon the parties in determined cases.[10] These parties have to come to the arbiters, who, once nominated, are obligated to accept and resolve the controversy. Voluntary arbitration occurs when the parties freely agree upon the commitment and the chosen arbiters could accept or refuse the duty. These classes of arbitration appear in the *Ius decretalium*, which took them from Roman law. The *CIC*/1917 practically abrogated the figure of necessary arbitration (cc. 1929 and 1932),[11] and the *CIC* (cf. c. 1714) quite clearly adopts a position in favor of the autonomy of the will of the parties in relation to this subject.

The distinction between arbitration by law and of equity is based on the form utilized by the arbitrators who have been designated to resolve the controversy. If the resolution is technical, *ad normam iuris* (cf. c. 1929 *CIC*/1917), it involves arbitration by law. In contrast, if one is

10. Cited as cases that typically need arbitration are those contemplated in *X* I, 3, 14; *X* I, 29, 39; etc.
11. Cf. P.A D'AVACK, "Arbitrato," in *Enciclopedia del Diritto*, II (Milan 1958), p. 960.

seeking a resolution based not on a juridical technical aspect of the question but on the sound learning and understanding of the arbitrators, "looking at the circumstances of every case,"[12] the arbitration is one of equity.

Historically, canonical doctrine has pointed out the interrelationship existing between these four classes of arbitration by drawing attention to the fact that the form of resolution of the controversy most proper in necessary arbitration was the juridical or technical aspect —the arbitration of law— having at one's disposal the arbitrators in the handling of the case, *di una vera giurisdizione giudiziaria e quindi coercitiva come il giudice.*[13] For its part, the resolution based on equity appears more relative to voluntary arbitration, in which the arbitrators are restricted to the limits imposed by the parties in their commitment to the arbitration.[14]

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12. M. CABREROS, *Del compromiso arbitral,* in *Comentarios al Código de Derecho Canónico,* III (Madrid 1964), p. 665.
13. P.A. D'AVACK, "Arbitrato," cit., p. 960.
14. Cf. ibid.

1714 **De transactione, de compromisso, deque iudicio arbitrali serventur normae a partibus selectae vel, si partes nullas selegerint, lex ab Episcoporum conferentia lata, si qua sit, vel lex civilis vigens in loco ubi conventio initur.**

The norms for settlements, for mutual promises to abide by an arbiter's award, and for arbitral judgements are to be selected by the parties. If the parties have not chosen any, they are to use the law established by the Bishops' Conference, if such exists, or the civil law in force in the place where the pact is made.

SOURCES: cc. 1926, 1930; *SN* cann. 96, 107

CROSS REFERENCES: cc. 22, 445, 1713, 1715, 1716

COMMENTARY

Rafael Rodríguez-Ocaña

1. *Normative sources*

The *CIC* of 1917, in the canon parallel to this one, prescribed that norms established by the civil legislations of the place where the settlement or the compromise through arbitration took place should be followed, "as long as these settlements are not opposed to the divine or ecclesiastical Law and without prejudice against what is laid out in the following canons" (c. 1926). This canon also was applied to compromise by arbitration (cf.. c. 1930 of the *CIC*/1917).

On the contrary, the *CIC* of 1983 establishes a normative precept in which the principle of autonomy of the will of the parties predominates; they themselves establish the norms that must be followed in the method chosen to avoid trials. Where these are absent, the settlement, compromise and arbitral judgment will be regulated by the law —if applicable— enacted either through the bishops' conference or through the prevailing civil law in the place the agreement is concluded.

The tone of the canon actually seems to indicate a preference among the three normative sources indicated above. The Code points to a primacy of what has been established or chosen by the parties (*serventur normae a partibus selectae*); only if these parties have not indicated or chosen anything (*si partes nullas selegerint*) will their agreements observe either the law of the bishops' conference or the civil law.

2. *Norms established by the parties*

Therefore, the parties who put agreements of this type into proper form have the ability to describe in detail the norms by which the agreements must be managed. Alternatively, they can choose the particular law or the civil law for those cases. In the case of an explicit election of the particular law of the conference or that of the civil law, the norm chosen by the parties must regulate the settlement, compromise and judgment by arbitrators not as a supplementary source, but as the principal source. This is because the parties did not make the proviso for a determined set of regulations and the compromise and the judgment by arbitrators was, as it were, their principal source; also the source was expressly chosen for them.

It has been pointed out that this aforementioned scenario will often be the case, especially those situations inclining toward the civil law, and the reason lies both in the complexity which is involved in proceeding to an elaboration of those norms, which require going to specialists, and in the civil effects which can follow once the agreement has been concluded.

Up to what point can the parties be in control? The primacy of the autonomy of the will introduced into these matters by the canon obviously has its limits, although these remain unspoken. Normally, in cases similar to these, the canonical legislator establishes clauses that mark the boundaries; thus, for example, the civil law is always canonized whenever it is not contrary to the divine or ecclesiastical law and without prejudice to what has been set up by canon law.

In this sense, the *CIC* determines the general method in c. 22. It states that the civil laws in matters in which the law of the Church has left their resolution to them must be observed insofar as they are not contrary to the divine Law and always insofar as they do not stipulate anything contrary to canon law.[1] The canon is applicable to the norms put forth by the parties. Consequently, the autonomous regulation of the agreements to avoid litigation will be legitimate if it has respect for the divine Law and the dispositions of the *CIC* that are applicable to the case.

Moreover, canon law understands that the interpretation of the nonecclesiastical laws to which the legislator has consigned it must look for harmony with the spirit of the canonical system.[2] This implies a set of basic principles, among which are found the features of the different juridical canonical institutions just as they are understood through Church law. Therefore, the norms originating from the parties for applying the canonical methods of avoiding litigation in the church must consider the juridical

1. One can find express applications of the provisions of c. 22 in cc. 98 §2, 197, 1290, 1672, 1692 §2, etc.
2. Cf. P. LOMBARDIA, commentary on c. 22, in *CIC Pamplona.*

nature of such agreements, not to mention the potential of such agreements for distortion.

This question is relevant if we consider that in c. 1713 the expression "transactio seu reconciliatio" refers to two different covenants to avoid trial —settlement in the strict sense, on the one hand, and reconciliation on the other— or for a single agreement, which would suppose the introduction of a new concept of settlement distinct from the classic concept and of a more open character (see the commentary on c. 1713). Therefore, if settlement is taken in its strict sense, the norms given by the parties will have to rely on the essential elements of the settled contract (its bilateral character, its onerousness, etc.). On the contrary, if one holds that the canon authorizes a broader concept of settlement, it suffices to have the norms dictated by the parties guarantee the accord of their wills with independence from the existence of the reciprocity in benefits.

Finally, the canon does not point out the need for the parties to respect certain formalities when deciding upon the rules that are to regulate these agreements. However, it seems logical to advise that the previously mentioned norms be put into writing and initialed by the parties.[3]

3. *Law of the Bishops' Conference*

The canon refers to the law of the bishops' conference as the second normative source for the agreements if the norms set up by the parties are lacking. Therefore, we are facing one of the tasks that the canonical legislator entrusts to bishops' conferences, to proceed to their own regulation by means of a general decree (cf. c. 445).

Few bishops' conferences regulate this question in their complementary norms to the *CIC*. As of 1990, of the nine conferences that take c. 1714 into consideration, only one —the Bishops' Conference of Nigeria— prescribes the procedure to follow.[4] The Bishops' Conferences of Panama, Mexico, India and Malta refer to what is set up in c. 1714 and do not necessarily provide a specific law to observe in the extra-judicial agreements[5]; this is also the option presented by the *CCEO* in its c. 1164 for the concrete case of settlement. For their part, the Bishops' Conferences of El Salvador, Guatemala, Gambia, Liberia-Sierra Leon and Italy have referred such matters to the civil law, refusing to provide canonical norms in this respect.[6] The Bishops' Conference of Chile establishes that the

3. The CCEO demands that the commitment (cc. 1168 and 1171, 2°) and the acceptance of the arbitrators (c. 1173) be made in writing.
4. Cf. J.T. MARTÍN DE AGAR, *Legislazione delle Conferenze Episcopali complementare al CIC* (Milan 1990), pp. 34–35.
5. Cf. ibid., pp. 535; 468–469, 351 and 454.
6. Cf. ibid., pp. 613, 319, 297, and 386.

agreements made to avoid trials must follow the norms set up by them "or in accord with the person whom the bishop appoints from one of the parties,"[7] adding "without a sincere effort in the search for this arrangement it will not be possible to begin the litigation."[8] This implies going beyond what has been established by the legislator, since it is giving it a preceptive character, by means of the particular law, for an activity, which, although very commendable from all points of view, does not have that compulsory character in common law. Moreover, the arrangement can be considered as a limitation of the right to the juridic protection acknowledged in c. 221.

The Bishops' Conference of Nigeria creates Councils of Arbitration at different levels (parochial, diocesan, regional and national) to resolve controversies extrajudicially. It sets up norms about the arbitrators in these councils, and it regulates the process with a general treatment to be followed in an arbitrary judgment, which will have its principal center in the tribunal.[9] This structure leads one to think that, in this respect, it was inspired by the procedure for the oral contentious trial (cf. cc. 1656ff).

Finally, the Spanish Bishops' Conference, in its first general decree about the complementary norms for the *CIC*, provided for the future "dictating of the particular norms concerning that to which the canons ... and 1714 made reference."[10] However, as of this writing, that Conference has not established norms in this regard.

4. *The civil law*

If there is no law from the bishops' conference, there will be an application "of the prevailing civil law in the place where the agreement has been concluded." The prescription governs in the case where norms set up by the parties do not exist, etc. This means that the prescription does not provoke the emergence of conflicts.

In Spanish law, settlement is regulated by the civil Code in articles 1809–1819. Article 1809 defines settlement as a contract through which the parties, giving, promising or retaining something by each one, avoid the instigating of litigation or they put an end to one that has already begun. The following articles, 1810 and 1812, treat the settlement made through third parties in the name of the title-holders; the articles 1813 to 1815, treat the object of the settlement; and the articles 1816 and 1819 control the efficacy and possible challenge of the agreement.

7. Ibid., p. 181.
8. Ibid.
9. Cf. ibid., pp. 501–503.
10. BOCEE 1 (1984), pp. 98–99.

In Spanish law, arbitration is the concern of law number 36/1988 of December 5,[11] Title I which limits the scope of competence, formulating the object —which can be present or future— which the arbitration is going to treat. Title II introduces the principle of formal liberty in the arbitral agreement. It presents the possibility for the parties to defer to a third party for the naming of the arbitrators, and the possibility is given with a wide margin of action on the principle of autonomy of the will, etc. Title III refers to the arbitrators' ability, incompatibility, rejection and non-participation. The arbitral procedure is treated in title IV, while V regulates the arbitral decision, insisting upon its motivation and the reliable notification of the parties. When this is necessary, title VI is dedicated to jurisdictional intervention. Title VII regulates the recourse for annulling the decision. The competent body for this is the Provincial High Court. Title VIII regulates the execution of the decision. Finally, the last two titles refer to foreign decisions and to the norms of private international law relative to the capacity to accomplish the arbitrary agreement, for its validity and effects.

11. Cf. BOE, December 7, 1988.

1715 **§ 1. Nequit transactio aut compromissum valide fieri circa ea quae ad bonum publicum pertinent, aliaque de quibus libere disponere partes non possunt.**

§ 2. Si agitur de bonis ecclesiasticis temporalibus, serventur, quoties materia id postulat, sollemnitates iure statutae pro rerum ecclesiasticarum alienatione.

§ 1. Settlements and mutual promises to abide by an arbiter's award cannot validly be employed in matters that pertain to the public good, and in other matters in which the parties are not free to make such arrangements.

§ 2. Whenever the matter concerned demands it, in questions concerning temporal ecclesiastical goods the formalities established by the law for the alienation of ecclesiastical goods are to be observed.

SOURCES: cc. 1927, 1930; *SN* cann. 96, 99

CROSS REFERENCES: cc. 97, 98, 118, 1291–1298, 1431 § 1, 1485, 1691, 1696, 1711, 1713, 1714, 1728 § 1

COMMENTARY

Rafael Rodríguez-Ocaña

1. *Introduction*

In its two paragraphs, this canon describes the availability of the *ius cogens*; it supplies norms that must be observed in settlement, compromise and in the judgment through arbitrators. This takes place even before those arrangements that, in accord with c. 1714, the parties could set up in virtue of the principle of autonomy of the will that is recognized for them in the *CIC*.

The canon is centered on the object upon which the parties can agree or make a compromise (§ 1). The canon prescribes that, in some hypotheses —as in the case of ecclesiastical goods— determined formalities are to be observed (§ 2).

It seems opportune not to limit oneself to the objective requirements exacted by canon law, since other requirements or conditions exist, like the subjective and formal requirements. In some situations, these must be observed for the validity of the agreement formalized between the parties.

Consequently, a single treatment seems to be necessary so that the whole area of this topic, at least in its fundamental aspects, has a more complete vision of the juridical regulation of settlement, compromise and judgment by arbitration.

2. *Subjective requirements*

These requirements concern the juridical capacity and the work of the parties in effecting an agreement. Their capacity must be in agreement with the nature of the juridical act they want to carry out (cf. c. 124ff).

a) For the settlement

Normally, it is understood that the capacity to make a compromise is the same as that needed to make a transfer. The parties —because of the onerous nature of the settlement, understood in its strict sense— will put into the agreement the availability of their goods, of their patrimony, of their giving, promising or retaining something, with the purpose of avoiding or ending a lawsuit.

Therefore, the norms of the *CIC* relative to the majority of age must be observed (cf. c. 97). The norms also prescribe the supplementing of juridical capacity by means of the nomination of tutors or curators (cf. c. 98). In the case of juridical persons, the norms also apply to the rules that determine who are the legal representatives (cf. c. 118).

If the settlement is done through a procurator, a simple mandate *ad lites* is insufficient; the *CIC* expressly mandates that he have special power (cf. c. 1485).

b) For the commitment

One must distinguish two classes of subjects: *active*, that is, the parties who submit their matters to the judgment of arbitrators by means of an agreement; and *passive*, that is, the arbitrators, in the sense of who can be validly named to fulfill this function.

As to what refers to the parties, the required capacity for compromising is —just as it is in the settlement— that which is demanded for an alienation. What was said about the settlement is therefore applicable to this situation, including the mandate of c. 1485 for the position of the procurator.

As for the arbitrators, the *CIC*/1917 prohibited lay people, persons who are excommunicated, and those who are infamous, etc., from exercising this responsibility in ecclesiastical matters (cf. c. 1931). The *CCEO* presents a similar norm (cf. c. 1172), where it excludes minors, the excommunicated, those who are suspended or deposed, and religious and members of societies of the common life *ad instar religiosorum* without the permission of their superior. On the contrary, the *CIC* prescribes

nothing in this respect. However, it is logical to think that the nomination demands some minimum requirements with respect to their suitability and capacity—such as, for example, the exclusion of minors.

The requirements for the nomination of arbitrators in the Latin law must be mutually dependent upon the law of the bishops' conference or civil law, when the parties have neither established their own norms nor have chosen another established method.

The Nigerian Bishops' Conference has created Councils of Arbitration, establishing its members, arranged on distinct levels.[1] The law of Spanish arbitration, in its title III, regulates the entire theme that refers to the arbitrators, namely capacity, incompatibilities, rejection, etc. (cf. arts. 12–20).

Once chosen, the parties can challenge the arbitrators if there exists a just cause for it. Although the *CIC* says nothing in this respect, there are minimum demands of justice that, if they are not fulfilled, provide the foundation for the possibility of finding fault with or for the rejection of the arbitrators. The nature of these demands is a question that is brought up in the different ordinances during the barring or the recusal of the judge. The central idea that underlies the different motives for disbarment or recusal revolves around the impartiality of the judge, shown through the non-existence of a determined particular interest in the case (cf. cc. 1448–1449 *CIC*). This principle seems logical and is demanded of those who are named arbitrators, so that, were there to be a personal interest in the outcome of the conflict, they would have to be disbarred from accepting the nomination. Otherwise, the parties could reject them.[2]

3. *Objective requirements*

These objective requirements indicate what matters can be the object of settlement and compromise. Before considering concrete aspects with respect to the object, it is fitting to note that, in a general way, c. 1713 (see commentary) has already delineated what could be the objective contents of those agreements insofar as they pertain *ad evitandas contentiones iudiciales.*

Canon 1715 § 1 prescribes that, from the settlement and from the compromise through arbitration, those matters that pertain to the public good of the Church and also everything that is outside of the free disposition of the parties, should be excluded. The *CIC*, in contrast to c. 1927 of *CIC*/1917, prefers to give this general rule rather than to enumerate in

1. Cf. J.T. MARTÍN DE AGAR, *Legislazione delle Conferenze Episcopali complementare al CIC* (Milan 1990), pp. 501–503.
2. The CCEO deals with objections to the arbitrators in c. 1175.

detail what these matters are. The *CCEO* (cf. cc. 1165 and 1169) follows the *CIC* in this respect.

In accordance with c. 1715, one deduces the following:

— Private goods and rights are the only elements subject to a settled agreement. Everything pertaining to the public good of the Church is excluded, because it is not within the sphere of control by the parties. From the canons of the *CIC*, it is clearly deduced that there are cases where the canonical status of persons, both matrimonial, separation (cf. c. 1696) and nullity (cf. c. 1691), as well as those of sacred orders (cf. c. 1711), and penal cases (cf. c. 1728 § 1), are of a public nature. Therefore, they cannot be the object either of settlement or of compromise. In respect to contentious cases, where some doubt can be presented about their nature, the legislator mandates that it be the diocesan bishop who judges "if the public welfare is at issue or not" (c. 1431 § 1).

— However, it is not enough that the object be private. In addition, the object must be freely available; that is, it does not overstep the extent of the autonomy of the parties. This would happen in the matter of such objects or rights, even though they belong to the juridical or material patrimony of the person, where there is no possibility for alienation or compromise. It takes place, for example, with the fundamental rights of the faithful.[3]

— These contentious matters ought to stem from the contractual nature of the transaction, and the conventional aspect of the compromise, as well as from reliance on the fact that they are the means for avoiding *judicial contentions*. What is demanded is that there is controversy concerning the object or that the right of the parties is in doubt, at least subjectively, through some foundation in objective law.

— Finally, there is no room for a covenant concerning objects on which a finalized sentence has already been issued and executed.

4. *Formal requirements*

a) When it is a matter concerning ecclesiastical goods

The *CIC*/1917 ordered the observance of the civil laws of the place where these agreements are carried out, modifying in this respect the *ius vetus*.[4] Presently, what is demanded is only the fulfillment of certain formalities when the objects of the transaction or the agreement are ecclesiastical goods. In these cases, c.1715 § 2 prescribes that they fulfill the

3. Regarding the non-renounceable nature of the fundamental rights of the faithful, cf. J. HERVADA, *Elementos de Derecho Constitucional Canónico* (Pamplona 1987), pp. 105–108.

4. Cf. F. DELLA ROCCA, *Instituciones de Derecho Procesal Canónico* (Buenos Aires 1950), p. 398.

formalities required by law for the alienation of ecclesiastical goods, which are found in cc. 1291–1298 and can be summed up in this way:

— the goods must pertain to the stable patrimony of a juridic public person (cf. c. 1291);

— they must be able to be alienated (for example, relics cannot be alienated: c. 1190 § 1);

— the permission of the competent ecclesiastical authority must be obtained when the value of the transaction or the obligation exceeds the quantity established by law (cf. c. 1292).

These formalities exist because of the dispositive nature of the acts that the titleholder of the ecclesiastical goods performs at the time of the transfer or the compromise.

b) In the judicial settlement

In the case of judicial settlement, the agreement is submitted to the formality of approval on the part of the judge or the tribunal court, which is necessary for validity. In fact, the contract agreement of the judicial settlement involves a decree of merit or of the worthiness of the case and a decree for the process itself, which cannot be put into effect by the parties without the consent of the tribunal. The reason is that, in the trial —its public nature having been stipulated— the juridical procedural negotiations are not included. Canon 1512 intentionally points out, as a juridic and material effect of the citation legitimately made, that the matter loses its canonical integrity *(res desinit esse integra)*. This situation implies that the *res* of the trial loses its proper independence and its future development will depend upon the result of the sentence.[5] Therefore, it ceases being disposable in the hands of the parties and for any juridical and economic actuation in general, since it has been incorporated into the process as a disputed matter and has been put under the authority and protection of the judge until its resolution.

5. C. DE DIEGO-LORA, commentary on c. 1512, in *CIC Pamplona*.

1716 **§ 1. Si lex civilis arbitrali sententiae vim non agnoscat, nisi a iudice confirmetur, sententia arbitralis de controversia ecclesiastica, ut vim habeat in foro canonico, confirmatione indiget iudicis ecclesiastici loci, in quo lata est.**

§ 2. Si autem lex civilis admittat sententiae arbitralis coram civili iudice impugnationem, in foro canonico eadem impugnatio proponi potest coram iudice ecclesiastico, qui in primo gradu competens est ad controversiam iudicandam.

§ 1. If the civil law does not recognize the force of an arbitral judgement unless a judge confirms it, an arbitral judgement in an ecclesiastical controversy has no force in the canonical forum unless an ecclesiastical judge of the place in which it was given confirms it.

§ 2. If, however, the civil law admits of a challenge to an arbitral judgement before a civil judge, the same challenge may be brought in the canonical forum before an ecclesiastical judge who is competent to judge the controversy at first instance.

SOURCES: Signatura c. 120

CROSS REFERENCES: cc. 124–127, 1290, 1411, 1446, 1462, 1512, 1619–1627, 1645–1648, 1650–1655, 1713–1715

COMMENTARY

Rafael Rodríguez-Ocaña

1. *Introduction*

This is the last canon that regulates the methods of avoiding trials in the Latin Church. The norm contemplates certain suppositions of fact that refer to the efficacy of these agreements in canon law and of the possibility of their being challenged (for this notion, see the commentaries on cc.1713 to 1715, for the classes and the requisites for the validity of the transaction, the compromise and the arbitral judgment).

Treatment will first be given to the effects and juridic efficacy of these agreements; secondly, attention will be given to challenging them.

2. *Effects and efficacy of the settlement, the commitment and arbitral resolution*

As for their effects and efficacy, one must pay attention to the specificity of each institution. This makes it necessary to distinguish settlement from arbitration, and in so doing, to distinguish compromise from resolution and from the sentence by arbitration.

a) On the settlement

The settlement's principal effect is the conventional resolution regarding the questions in litigation.[1] This resolution is obtained by the accord of the parties attained during the trial and with the judicial approval—in which case, moreover, it puts an end to the instance—or, preceding the trial, for example, in the reconciliation foreseen by c. 1446.

In the law preceding the code, the pact of settlement attained its authority from the finalized judgment, even though its effect pertained only to the judicial settlement or the conventional agreement.[2] The immediate procedural consequence for such an effect was the possibility of opposing the petitioner by the peremptory exception of the *litis finitae*. In the *CIC*/1917 (cf. c. 1629) and in later doctrine, the previous postulates are maintained,[3] and the settlement pact is protected with the "exception of settlement."

The *CIC* follows the same criterion and orders that the "exception of the settlement" be proposed and treated before the *litis contestatio*; if this is brought up later, the one proposing it can be compelled to pay the costs, unless there is proof that the tardiness did not come about through malice (cf.. c 1462 § 1). The exception of the settlement pertains to the type of peremptory exceptions, even though it must be treated as dilatory; by means of that, the defenses are brought up —in this case the settlement resolution of the controversy— which annul the action of the petitioner or at least prevents him taking action.

The nature of the pact of settlement makes its execution possible, which will bring it effectively into conformity with cc. 1650–1655.

b) On the arbitral commitment and judgment

On the other hand, compromise and judgment by arbitration have as a first and principal effect that the matters brought out by both parties are resolved through the arbitrators, thus effecting a legitimate withdrawal from those controversies pertaining to the ecclesiastical jurisdiction.

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1. Cf. L. DE LUCA, *La transazione nel diritto canonico. Contributo alla dottrina canonistica dei contratti* (Rome 1942), p. 166.
2. Cf. ibid., pp. 180–181.
3. Cf. F. DELLA ROCCA, *Instituciones de Derecho Procesal Canónico* (Buenos Aires 1950), p. 399.

This effect remains procedurally protected through the exception of pendency of the case. Effectively, before the eventual question which one of the parties would like to interpose before the ecclesiastical tribunal so that the controversy might be legitimately recognized and substantiated, one can plead the arbitrary *perpetuatio iurisdictionis*. The origin of this is the valid compromise and the later acceptance by the arbitrators who are nominated.

From this point of view and in an analogical way, one can relate the effects produced by the legitimate notification of the citation or the appearance of the parties in the process to the compromise. These effects have a double juridical material significance and juridical formal significance (cf. c. 1512). The juridic formal effects are summed up into the *perpetuatio iurisdictionis* (c. 1512, 2 °) and the beginning of the pendency with the application of the principle *lite pendente nihil innovetur* (c. 1512, 5°).

Recourse to analogy to refer to the effects in one or another case is required because of the nature of the compromise. The parties can desist from this common agreement, or they can suspend it at any moment. This is possible due to the principle of autonomy of the will that prevails over all this matter through the mandate of c. 1714. Thus, if the parties by mutual accord can legitimately remove the resolution of the determined controversies respecting certain limits from the jurisdiction of the ecclesiastical tribunals, they will also be able to withdraw from the accord they have already reached whenever they jointly arrive at the new decision.

Another effect proper to the compromise takes account of the relationship that comes about between the arbitrators and the compromising parties. These remain in a grade of subjection in respect to the arbitrators, just the same as litigants are juridically related to the judge. This occurs in such a way that, along with the trial by arbitration itself, attention must be paid to the nominations and needed qualifications of the arbitrators.

c) On arbitral resolution

The efficacy of the arbitral resolution —called *laudo* in the Spanish civil law— that resolves the controversy is not immediate in the law of the Church. Paragraph 1 of the canon prescribes that, if the civil law does not recognize the efficacy of a sentence of the arbitrators which is not confirmed by the judge, the efficacy in the canonical forum is also submitted to the confirmation of the decree by the judge or by the ecclesiastical tribunal of the place at which the resolution has been arrived.

The norm attains general efficacy, which implies that whatever were the norms that regulated the arbitral trial (cf. c. 1714), the efficacy of the *laudo* in the canonical forum depends upon what the civil law establishes. Neither the norms of the parties, nor the law of the bishops' conference which regulates this matter, can give a different prescription.[4]

4. Cf. Z. GROCHOLEWSKI, commentary on c. 1716, in *Commento al Codice di Diritto Canonico* (Rome 1985), p. 983.

The civil law to which the canon refers will be, in principle, that law invoked by the parties if there is a wish to maintain "a minimum internal congruity of ordinances,"[5] not that of the place where the arbitral resolution has been given or of any other place. If the parties had not submitted themselves to a concrete civil law, application must be made *in fine* of c. 1714, which indicates as a normative supplementary source "the prevailing civil law in the place where the agreement is concluded" in cases in which no norm has been provided by the parties and no law has been produced by the bishops' conference.

In the Spanish law, the law of arbitration[6] does not require judicial confirmation of the decision for it to show its total efficacy in the juridical ordinance. The arbitral resolution, dictated in accordance with the norms of the Spanish civil law, only needs to be protocolled by a notary before being communicated authentically to the parties.[7] From that moment on, the controversy can be considered resolved and the decision juridically efficacious.

Consequently, the canonical arbitral sentences arrived at among the faithful who have abided by the Spanish civil law of arbitration, or who concluded their arbitral compromise in Spanish territory, do not need the judicial confirmation of the decision for it to be efficacious in the canonical forum.

3. *Challenge of the agreements*

It is now time to refer to the challenge of the methods of avoiding trials, distinguishing each of them, and considering that the *CIC* only refers expressly to the challenge of the arbitral decision, in § 2 of the canon.

a) Challenge of the settlement

The challenge of the pact of settlement is treated in different ways according to whether we are in the presence of the conventional or of the judicial category. However, before one emphasizes that difference of procedure, it is advisable to remember that the causes and the motives that must support the petition for contestation must be contained within the combined complex of norms. Actually, the motives for the rescission and nullity that are being adduced do not find their framework solely in the prescriptions of c. 1714. Canon 1290 on contracts is also applicable, as are cc. 124–127, which establish when the validity of nullity of juridic acts has been submitted.

5. L. MADERO, commentary on c. 1716, in *CIC Pamplona*.
6. Cf. Ley 36/1988, December 5, aa. 30–37.
7. Cf. ibid., art. 33.

The challenge of the conventional settlement is done by way of the contentious process, before the ecclesiastical tribunal that holds competence in the first instance.

The procedural treatment of the petition for nullity of the judicial settlement is more complicated, insofar as the judge who was hearing the case has approved the suit, by means of a decree. This decree also will put an end to the instance. Two possible cases must be distinguished in this hypothesis: *a)* that, although the settlement was valid, the decree of the judge suffers from some vice of nullity; and *b)* that the agreement is null but the decree has been issued in good form.

The procedural remedy in the suppositions that were pointed out is different. In the first one, the nullity of the decree lodging the complaint of nullity must be attacked (cf. cc. 1619ff). In the second, the nullity of the settlement pact can be challenged only by means of the *restitutio in integrum* (cf. cc. 1645ff), since the judicial settlement procures the effect of the completed judgment.

b) Challenge of the compromise

The challenge of the arbitrary compromise and the challenge to the decision given in the case as the resolution of the controversy also have a different focus or treatment. The *CIC* is referred to explicitly only for the challenge of the arbitrary sentence, not that of the compromise. This difference must not be surprising, since the compromise must be considered like a contract —a pact or agreement—among private individuals.

The efficacy of the arbitrary compromise depends upon various factors, beginning with the decision that puts an end to the controversy between the parties. This settlement is obvious, since the compromise is formalized to resolve possible controversies arbitrarily. If these arise but are substantiated under another form, it is evident that the compromise did not have actual efficacy. There are also determinants for the efficacy of the legitimate renunciation of the parties in question, such as the death of one of the parties, if a clause about the transference to the heirs does not exist. Others are the cessation of the controversy[8] and the lack of a challenge.

As has already been noted concerning the conventional settlement, the norms that frame the causes for rescission or nullity of the compromise are included in the canons that regulate juridical acts, specifically those on settlements and contracts.

The question of a challenge to a settlement is brought before the judge of first instance. He has the competence according to the forum of the contract (cf. c. 1411) and will follow the normal *iter* of contentious cases.

8. Cf. F. DELLA ROCCA, *Instituciones de Derecho Procesal...*, cit., pp. 404–405.

c) Challenge of the arbitral resolution

With respect to the challenge of the arbitral sentence —as for its decision— canon law prescribes that if the secular law permits it, it can be brought before the civil judge. In the canonical forum, the previously mentioned challenge can be proposed before the competent ecclesiastical judge of the first instance (c. 1716 § 2).

With this precept, the legislator makes a choice —according to some civil authors— of the doctrinal method. This means that, seeing as the decision is a purely private decision, its annulment belongs to the tribunals of the first instance. Others, on the contrary, maintain that the decision must be treated as if it were a sentence, and, consequently, its annulment would correspond to the supreme tribunals.[9] The prevalent Spanish civil law concerning arbitration represents an eclectic solution between the two points, since it entrusts competence to the National High Court, the intermediate jurisdictional bodies between the tribunals of first instance and the supreme tribunal.[10]

One should here invoke the details that were made to comment upon the efficacy of the arbitral decisions in the canon law code. That is to say that, in the first place, the civil law to which the legislator consigns in § 2 of the canon would be invoked for the parties in question. If those do not fall to anyone in particular, one ought to resort to the civil law of the place in which the arbitration was concluded.

Consequently, the decisions given according to the norms of the Spanish law of arbitration —if the parties have adhered to that— and also those dictated on Spanish soil —in the case in which the parties have not invoked a determined civil law— are challengeable before the ecclesiastical tribunals of the first instance, since the Spanish law of arbitration admits the possibility of the aforementioned challenge.

One has to notice, however, that, since it is certain that a canonical sentence about the challenge of a decision cannot be executed in the civil environment in Spanish law, one is running the risk that one of the parties is seeking a solution from the civil tribunals different from that given by the ecclesiastical tribunal. That would be perfectly feasible if the parties chose to adhere to the civil law, such as c. 1714 permits. Consequently, the mistaken idea that the civil tribunals were judging matters of the canonical forum would emerge. To avoid these misinterpretations, the bishops' conferences ought to have established norms about the different methods of avoiding judgments (cf. c. 1714), and, more specifically, about arbitration; that is, norms which do not present an option for a possible challenge to be made before the civil tribunals.

9. This was the case with the former Spanish law on private arbitration, December 22, 1953, art. 28.

10. Cf. *Ley de arbitraje* 36/1988, cit., tit. VII.

PARS IV
De processu poenali

PART IV
The Penal Process

INTRODUCTION
Josemaría Sanchís

1. The canonical penalty can be applied either automatically, by being incurred *ipso facto*, or by means of a sentence or a decree *(ferendae sententiae)*, in such a way that it is obligatory upon the offender only from the time it is imposed (c. 1314). The penalty *latae sententiae* can also be declared by a sentence or decree.

Part IV or book VII of the Code, entitled "The Penal Procedure," regulates the previously mentioned process. It is important to point out that under this rubric both the judicial procedure and the administrative procedure for the applications of canonical sanctions are included. In the current discipline, therefore, with the common term "penal procedure," there are indicated two penal processes, the judicial and extrajudicial or administrative, which are quite different in nature and characteristics yet share some common fundamental principles.

For reasons that are more practical and unanticipated, and not of a character that is scientific and doctrinal, it has been considered opportune to use the adjective "penal" instead of "criminal' as the title for this type of procedure.[1] However, it must be stressed that the direct and immediate objective of the procedure is not the application of the penalty, as the qualification of "penal" seems to suggest, but to demonstrate the existence of the delict and that it has been committed by the person being accused, as well as to come to a determination of the level of imputability and, in this case, to proceed to the imposition of the suitable penalty.

2. This part of book VII consists of fifteen canons, assembled in three chapters: I. "The preliminary investigation" (cc. 1717–1719); II. "The development of the process" (cc. 1720–1728); and III. "The action for the indemnification for damages" (cc. 1729–1731). "The outline of the canons

1. Cf. *Comm.* 12 (1980), pp. 188–189; and 16 (1984), p. 78. Cf. also J. HERRANZ, *Studi sulla nuova legislazione della Chiesa*, (Milan 1990), p. 36.

about the *processu criminali* was constituted mainly while searching for simplification and precision (both terminologically and substantially) of the norms, the facilitation of the trial, the coordination of this part with the *schema* of the canons *de iure poenali*, and the regulation of any point that is not regulated in the Code."[2] This legislative arrangement has also inclined toward brevity of the norms now being examined.

It is also important to underscore the similarity between the *CIC* and the *CCEO* about this matter. Title XXVIII of the Eastern Code begins with the rubric "The procedure in imposing penalties," divided into two chapters, "The penal trial" and "Imposition of penalties by extra judicial decree." One should not forget that penalties *latae sententiae* do not exist in Eastern canon law.

3. The canons of the first chapter of this part of the *CIC* do not refer only to the preliminary investigation,[3] as it would seem to be indicated by the title. Its norms embrace the entire ideology that goes from the notification of the delict to the decree with which it is decided whether to put the penal process into action or not. It is important to consider that the investigation regulated by the Code is not one phase of the trial, but is an autonomous juridic institution, preparatory to the penal trial, and common to the two procedures, administrative and judicial. The different authors do not show any doubt when they affirm the administrative nature of the investigation in the current law. In fact, the provisions of the Code are subordinated to the ordinary in the exercise of his executive power of governance, insofar as it refers to his executive power of governance. From here, one deduces that the acts of the investigation have an administrative nature, as well as all the juridic consequences that are derived from it.

The preliminary investigation to the penal trial must not be confused with the instruction of the judicial penal process (c. 1428 § 1), or other interventions that are also anticipatory to other numerous procedures that have a different objective. For example, there is the procedure for the removal of pastors (c. 1742 § 1), the gathering of proofs in the procedure for the dismissal of religious (cc. 694 § 2, 697,1°), and the gathering of information for the application of penal remedies (c. 50 in relationship with c. 1342 § 1), etc.

4. In the chapter about the development of the trial, the Code regulates some aspects that refer both to the administrative procedure and to the judicial process. The canons of this part offer only a few specific norms that must be integrated with those of the respective process regulated in other parts of the Code, as c. 1728 § 1 explicitly establishes with respect to the judicial process. This is an equally valid principle because it

2. *Comm.* 6 (1974), pp. 40–41.

3. Regarding the topic, cf. J. SANCHIS, "L'indagine previa al processo penale," in *Ius Ecclesiae* 4 (1992), pp. 511–550.

refers to the administrative procedure in the sense that what is over and above what is stipulated by c. 1720. One will have to adhere to the norm concerning the procedure for the formation of administrative acts and, more concretely, of the individual decrees, contemplated principally in cc. 35–58. The *iter* of the *CIC* states: "The matters concerning the application of the penalties in the administrative procedure have been completely omitted on this point, having been referred to the norms which are represented in the outline *de iure poenali (Penal law —for the title of the application of penalties)* and *de procedura administrativa*."[4] Later, in this part of the Code dealing with trials, it was considered opportune to add some specific norms referring to the extrajudicial procedure, which are now contained in c. 1720.[5]

Therefore, in the current legislation, there does not exist an autonomous penal process, but an administrative procedure and an ordinary contentious process with some specifications for the cases regarding the penal matter. These processes are not *special* processes, but specific *ordinary* processes, that is to say, penal (administrative or judicial). For a special process, it seems that *Pastor Bonus* 52, is referred to when it is stipulated that the CDF recognizes determined delicts, and that the CDF "proceeds to declare canonical sanctions or to impose them in accordance with the law, both common and proper." In any case, this special penal process cannot be contradictory to the Code, nor can it go against the procedural guarantees of the one who has been charged, guarantees that are defined and acknowledged by common law.

5. The judicial trial is preferred by the guidelines of the Code, and because of this norm, it enjoys being privileged as the means for the application of any type of canonical penalty. The opinion of learned teaching on this point has been agreed upon and is unanimous. Therefore, the judicial procedure must be considered as the "ordinary" route. Only when situations that prevent or are opposed to the performance of the trial exist is recourse to the administrative method (c. 1342) permitted. The extrajudicial decree constitutes an exception to the norm, and in the evaluation of this procedure, the objective elements prevail over the subjective.

As a matter of fact, the judicial process offers greater guarantees of justice and of fairness insofar as it is permitted to exercise in an adequate manner the right of defense; to accumulate, by means of the judicial acquisition of proofs, a greater moral certitude about the existence of the delict; to carefully evaluate the circumstances of the offence and the imputability of its author; to clearly state the level of contumacy of the offender and his condition and situation; to determine the level of social harm caused by the delict; to apply, with a truly pastoral meaning, the most just and suitable penalty, holding before one's mind the different

4. *Comm.* 6 (1974), p. 41.
5. *Comm.* 12 (1980), p. 192.

elements and circumstances of the offence and of the offender. Finally, in the administration of justice, even before the serious and scandalous actions that every offense brings with it, the Church acts with severity and impartiality without permitting arbitrary or impromptu action.

In this respect, Pope John Paul II, in his 1990 discourse to the Roman Rota, expressed himself concerning the relationships between pastoral practice and the law of the church: "The institutionalization of that instrument of justice which is the trial represents *a progressive conquest of civilization and of respect for the dignity of man*, and, in a notable way, the Church has contributed to this with its canonical process. To accomplish this, the Church has not denied its mission of charity and peace, but has only prepared a way sufficient for that verification of the truth which is the indispensable condition for justice inspired by charity and through this itself the verification of true peace as well."[6]

6. The general plan of the Code's norms concerning this matter nevertheless contrast with the situation in which penal trials are actually encountered, particularly judicial trials, which are practically nonexistent because they are widely considered difficult to achieve in practice. In this way, the judicial trial has been made inoperative and inefficacious for the safeguarding and defense of not a small part of the communion of the faithful in the matter of the sanctioning norm of the church. Certainly, this urgent problem must be confronted. According to the view of learned teaching, this problem has not been resolved by the new Code. On the occasion of the reform of the *CIC*/1917, in the study group for the elaboration of the penal law, and treating of the preference which would have to be given to the use of the one or the other route —judicial or administrative— the consultors appeared to agree that the judicial trial did a better job of guaranteeing justice in its application of penalties. However, the exclusivity of this route was considered "contrary to the reality which demands a nimble and unhindered instrument, such as exists in the administrative route." There was this addition further on, however: "In the new Code there will be procedural administrative norms, which present provisions equivalent to those stated in the judicial procedure."[7] These norms about the administrative procedure were never promulgated.

7. Reading the acts of the meetings, one deduces that the force accomplished by the consultors to find a balanced solution to the question of the just application of penalties takes into account various needs and situations. This preoccupation is manifested in a particular way with respect to those serious criminal situations that require an intervention of the proper ecclesiastical authority, for the purpose of restoring justice and repairing the serious harm and scandal that has been produced. It is

6. JOHN PAUL II, "Address to the Roman Rota," January 18, 1990, in *L'Osservatore Romano*, January 19, 1990, p. 5.
7. *Comm.* 9 (1977), pp. 161–162.

inferred that the desire to bring about the substantial penal law is truly applicable and, when necessary, that it be applied by means of an effective process. It also deduces that this effective process, consequently, would constitute a pastoral instrument useful for the welfare of the people of God. One would wish, on the one hand, for a procedure that, founded on the principles of the judicial trial, would be characterized by its speediness and timely support. There is recognition for the need to guarantee, by means of a trial, objectivity in the search for truth, impartiality and independence of the persons called upon to judge each case, and the need to protect the rights of the faithful, especially their right to defense. On the other hand, one would also desire that, for the good of souls, the difficulties and the dangers that the concrete accomplishment of the judicial process involves might be overcome by taking into account the possible delays in the substantiation and the resolution of lawsuits and the lack of suitable measures in ecclesiastical tribunals. However, in addition to those routes already in existence, other intermediate ways are endowed with notable features that have not been substantially studied. Neither have they been seriously taken into consideration for the purpose of their being applied in some concrete occasions, as determined by the norms. For example, a judicial process founded upon the principles of orality, immediacy and the convergence of procedural acts in the hearing before the judge, is analogous to the oral contentious process regulated in the current Code (cc. 1656–1670). It is also suitably adapted to penal cases and has been combined together with the current penal trial, as was suggested during the refinement of the new Code.[8] The reason alleged to exclude the contentious oral trial from penal cases was the possibility of proceeding by means of the administrative route when the urgency of the case would recommend it. However, this route has not succeeded, since not all penalties can be imposed by an extrajudicial decree. It would be opportune to have a greater variety of penal trials, and, at the same time, to have a more precise differentiation between the scope of penal and disciplinary actions. In this way, one would be able to present a rejoinder that applies to different situations. In this sense, the specific regulation would be able to accomplish an important function.

8. The executive and judicial authority competent to hear each concrete case is determined through the specific norms for competence in reference to the penal cases, and is set up by reason of territory, persons and subject matter.

As for the territorial criterion, competency exists: *a)* according to the *forum of one's domicile,* in the authority of the place in which the offender has his domicile or quasi-domicile, or, if he does not have either, where he can be found at that time (cc. 1408–1409); *b)* according to the

8. *Comm.* 12 (1980), p. 199

forum delicti, in the authority of the place in which the delict was perpetrated (c. 1412).

When one takes into consideration the condition of the person, there are some criteria of competence depending on whether the ones referred to are Cardinals, legates, bishops, etc., who can be judged only by the Roman Pontiff (cc. 1405 and 1444), or religious (c. 427).

Finally, when one considers the subject matter of the offense, there is in addition to the criterion concerning the matter of assumed obligations (c. 1411 § 2), the importance of remembering above all what *Pastor Bonus* puts forth in no. 52. The CDF "tries delicts against the faith and also of those most serious offenses, which were committed both against morality and in the celebration of the sacraments which have been brought to the CDF." One is here dealing with a competence established with respect to the other dicasteries of the Roman Curia,[9] which does not exclude the competence of inferior tribunals. The principal problem which this arrangement sets up refers to the concrete determination of the offenses within the competence of the Congregation, since all offenses enter or can enter, which aside from the juridic uncertainty that this brings with it, vacates or can vacate the competence in penal matters concerning the tribunals of the Apostolic See.

9. Cf. also *PB*, 19 §2, and RGCR, 112 §2

CAPUT I
De praevia investigatione

CHAPTER I
The Preliminary Investigation

1717 **§ 1. Quoties Ordinarius notitiam, saltem veri similem, habet de delicto, caute inquirat, per se vel per aliam idoneam personam, circa facta et circumstantias et circa imputabilitatem, nisi haec inquisitio omnino superflua videatur.**

§ 2. Cavendum est ne ex hac investigatione bonum cuiusquam nomen in discrimen vocetur.

§ 3. Qui investigationem agit, easdem habet, quas auditor in processu, potestates et obligationes; idemque nequit, si postea iudicialis processus promoveatur, in eo iudicem agere.

§ 1. Whenever the Ordinary receives information, which has at least the semblance of truth, about an offence, he is to enquire carefully, either personally or through some suitable person, about the facts and circumstances, and about the imputability of the offence, unless this enquiry would appear to be entirely superfluous.

§ 2. Care is to be taken that this investigation does not call into question anyone's good name.

§ 3. The one who performs this investigation has the same powers and obligations as an auditor in a trial. If, later, a judicial process is initiated, this person cannot take part in it as a judge.

SOURCES: § 1: cc. 1939, 1940
§ 2: c. 1943
§ 3: c. 1941

CROSS REFERENCES: cc. 127, 220, 471, 1390, 1428, 1455, 1526–1583

COMMENTARY

Josemaría Sanchis

The investigation

1. *Preliminary notice and necessary contents* (§ 1)

To begin the investigation, it is necessary to have information about the commission of an offense. On this point, the former discipline was much more detailed than the present one, since it expressly considered the public report, a simple accusation, a complaint of denunciation and the general or informative inquiry (cf. c. 1939 *CIC*/1917) as ways for settling upon news of an offense.

Any person may report an offense. This must be considered not only a capability but also an obligation, moral or juridic, according to the case. The report has a purely informative character, and by means of this, all those elements and indications must assist in arriving at knowledge of the truth about the presumed offensive deeds. However, the presentation of the report does not take for granted that a criminal action took place—this faculty belongs solely to the promoter of justice by order of the ordinary (cf. cc. 1430 and 1721 § 1), and never by the injured party—nor does it bring with it the obligation of demonstrating the culpability of the accused. According to the *CIC*/1917 (cf. c. 1942 § 2), reports made through an enemy of the one being accused, or anonymous reports that do not contain sufficient elements to consider the accusation probable, do not have to be taken into consideration. In the current norm, the false report is also constitutive of an offense (c. 1390). In the *CIC*/1917, the report was called a *querella* when it referred to the offenses of defamation or of injury and was filed by the offended person. In such cases, the complaint "of the injured person" constituted a requirement normally necessary to proceed against the offender. In the current law, this institution has been abolished.

The responsibility for the preliminary investigation falls upon the ordinary. He must decide whether the investigation is to begin and when it is concluded, when the trial is to begin, the kind of procedure to follow, the record of the case, etc. This discretionary power must not be confused with arbitrariness, but the powers that the ordinary enjoys make him the principal guarantor of the welfare of the community and the rights of the faithful.

For the investigation to begin, the decision of the ordinary is required, an action taken by means of a decree that includes the nomination of the investigator. The positive condition for the initiation of the investigation is that, from the information obtained, there be deduced such

clues as would make probable the commission of an offense. At any rate, the canon does not seem to allow that one deduce the existence of an obligation, at least of a juridic nature, and to decree the undertaking of an investigation whenever such a condition is verified. The investigation could be omitted as superfluous in the case of public and well-known offences, which would not require an investigation prior to verification. This interpretation confirms what one reads concerning a proposition in a phase of the editing of the *CIC*: "One of the consultors, at the suggestion of some consultative body, proposes that a § 4 be added with these words: 'Whenever one is dealing with an offense that is in every way certain, this investigation can be omitted.'" This proposal met the approval of the consultors. However, another consultor suggested that, in place of the new § [paragraph], this clause be added to § 1: 'unless this investigation seems entirely superfluous.'"[1] At any rate, in these cases, it will always be necessary to gather the elements of proof to begin the penal process.

The object of the preliminary investigation is the action through which one obtained knowledge of the offense and which is constitutive of a canonical offence, at least in appearance, because it conforms to any one of the kinds of offenses expressly contemplated by the penal norms. To determine the object of the investigation, the normative text establishes that an inquiry must be made "concerning the facts and its circumstances as well as its imputability," that is to say, concerning the diverse elements or aspects of the offense. The investigation is to determine whether the knowledge of the commission of the delict has or does not have a foundation, and, proceeding from such data, to be able to decide about the means to be adopted.

The Code is not very explicit about how one must accomplish the investigation, but, all things considered, it discusses: *a)* "investigating with caution" the facts and the circumstances of the offense and the imputability of the one who is suspected, and *b)* "to gather" sufficient components so the ordinary can decide, with a knowledge of the case, the means to employ.

The preliminary investigation does not have as its unique and exclusive objective or necessary finality putting into operation the penal trial, but rather the gathering of all those necessary factors that permit a responsible exercise of the pastoral function. Because of this, the institution would have to supply efficacious proof that the canonical penalty is in truth the *ultimate resort* among the pastoral means addressed to make a suitable ruling for ecclesiastical discipline.

1. *Comm.* 12 (1980), p. 190.

2. *Respect for the good reputation of the parties* (§ 2)

One of the informed principles upon which to base the development of the investigation is to avoid the unnecessary impairment of anyone's reputation, including the accused. His good reputation constitutes a fundamental right, acknowledged in c. 220.

Another principle related to the former is that of discretion or reservation. The canons which refer to the obligations of those who intervene in the investigation insist upon maintaining the confidentiality of office (cf. cc. 471,2° and 1455 § 1), or correctly permit the competent authority to impose the confidentiality by reason of the seriousness of the case (cf. c. 127 § 3) or when, through the divulging of the acts, one might put into danger the reputation of others, or scandal may arise, etc. (c. 1455 § 3). All of this implies that, in principle, the fact itself of an investigation being conducted about him must not be revealed to the defendant. However, nothing keeps the ordinary, from the moment of the knowledge of the offense and even during the development of the investigation, to be able to take some pastoral initiative, with respect to the accused, by getting information directly from him to learn his version of the facts and his actual situation.

3. *The investigator* (§ 3)

Although the proper ordinary might personally carry out the inquiry, it seems advisable that he entrust this duty to a suitable person the Code names as "investigator." It has not been considered suitable for the promoter of justice to intervene in this preliminary phase to the trial.[2] The nomination of the investigator comes under the jurisdiction of the ordinary.

The office of the investigator must be discharged by a suitable person, a cleric or a layperson, male or female.[3] The possibility of the choice falling upon a judge[4] must not be excluded, or even upon the promoter of justice. However, in such assumptions, their functions and their competencies are evidently limited to those proper to the investigator. In any case, to guarantee objectivity and impartiality, whoever fulfills the role of investigator, "if a judicial trial is carried out afterwards, the function of the judge cannot be carried out by him." On the other hand, nothing prevents the investigator from being able to be, in the trial that follows later on, the promoter of justice, but still more, in some cases it will be the most advisable step to take.

2. Cf. *Comm.* 12 (1980), p. 190.
3. Cf. *Comm.* 12 (1980), p. 189.
4. Cf. ibid.

The investigator "has the same powers and identical obligations as the auditor in a trial." In accordance with c. 1428 § 3, the gathering of proofs belongs to the investigator, while deciding "what proofs have to be assembled and in what way." For the carrying out of the investigation, the norms contained in cc. 1526–1583 concerning proofs are applied, with appropriate adaptations.

The investigator carries out the inquiry under the direction of the ordinary, who will be able to provide suitable direction about the proofs that must be collected, etc. Moreover, even though during this phase the intervention of the promoter of justice is not necessary, if the ordinary considers it important, there is nothing preventing him from being able to be present.

It must be noted, however, that the proofs gathered in the acts or the summary of the investigation are not such as to be considered in a proper and true judicial sense: in order for them to have merit and probatory force and serve in relationship to the sentence, they will have to be alleged and appear again in the trial. In fact, it is necessary to distinguish between the activity of the search, the identification and the affirmation of the sources of proof and the activity of the formation of the evidence. The acquisition of the evidence relative to the decision demands the consideration of its refutation. This is a principle that is also present in the current penal administrative procedure (cf. c. 1720,1°). Otherwise, nothing would prevent part of the probatory material being formulated in the step before the trial.

All the activities will have to be carried out observing the formalities established by law, gathering them in writing with the intervention of the notary, for the purpose of obtaining a faithful documentation of the acts performed.

1718 **§ 1. Cum satis collecta videantur elementa, decernat Ordinarius:**
1° num processus ad poenam irrogandam vel declarandam promoveri possit;
2° num id, attento can. 1341, expediat;
3° utrum processus iudicialis sit adhibendus an, nisi lex vetet, sit procedendum per decretum extra iudicium.

§ 2. Ordinarius decretum, de quo in § 1, revocet vel mutet, quoties ex novis elementis aliud sibi decernendum videtur.

§ 3. In ferendis decretis, de quibus in §§ 1 et 2, audiat Ordinarius, si prudenter censeat, duos iudices aliosve iuris peritos.

§ 4. Antequam ad normam § 1 decernat, consideret Ordinarius num, ad vitanda inutilia iudicia, expediat ut, partibus consentientibus, vel ipse vel investigator quaestionem de damnis ex bono et aequo dirimat.

§ 1. When the facts have been assembled, the Ordinary is to decree:
1° whether a process to impose or declare a penalty can be initiated;
2° whether this would be expedient, bearing in mind Can. 1341;
3° whether a judicial process is to be used or, unless the law forbids it, whether the matter is to proceed by means of an extra-judicial decree.

§ 2. The Ordinary is to revoke or change the decree mentioned in § 1 whenever new facts indicate to him that a different decision should be made.

§ 3. In making the decrees referred to in §§ 1 and 2, the Ordinary, if he considers it prudent, is to consult two judges or other legal experts.

§ 4. Before making a decree in accordance with § 1, the Ordinary is to consider whether, to avoid useless trials, it would be expedient, with the parties' consent, for himself or the investigator to make a decision, according to what is good and equitable, about the question of damages.

SOURCES: cc. 1942 § 1, 1946

CROSS REFERENCES: cc. 47, 57, 58, 196, 290, 1336, 1339, 1341, 1342, 1362, 1446, 1452, 1713, 1715, 1724, 1726, 1729 1734

COMMENTARY

Josemaría Sanchis

Conclusion of the investigation

1. *Decision of the ordinary* (§ 1)

The ordinary must render a decision about the conclusion of the investigation by means of a decree when, keeping in mind the opinion of the investigator, he has established that "they have already culled sufficient elements" to ensure the highest knowledge possible of the facts. The elements or clues that are gathered are sufficient when, after having analyzed them, the ordinary considers that he can decide, prudently and with good reason, to choose whether to file the acts in the archives or to put a trial in motion. The Code does not establish any limit of time for the duration of the investigation. At any rate, one has to bear in mind the rules for prescription of the criminal action (cf. c. 1362).

The questions that must be the object of prudent evaluation on the part of the ordinary are the possibility and advisability of a trial, and whether to pursue the administrative or the judicial route.

a) *Viability of the process* (1°)

The main requirement necessary to commence a penal trial is the existence of serious evidence that can be manifested in the external forum about the commission of the offense and the imputability of its perpetrator. Where this evidence does not exist, a trial is impossible, and there is an obligation to resort to filing the acts in the archives. Moreover, if one deduces the innocence of the accused from the investigation, there is a greater reason to resolve the case in this manner.

Where the facts are concerned, the certitude that is required to begin the trial is not the same as the certitude for the issuing of the sentence. To begin a trial, serious causes are required; in contrast, to pronounce a sentence of guilt, moral certitude about the culpability of the accused is demanded. In the preliminary phase of the trial, the decision of the ordinary does not refer to a determination that the offense took place or the penalty that should be applied. The ordinary or the judge will do this only after having listened to the accused and given him the possibility to defend himself (with the intervention of an advocate, etc.), following all the norms for the progress of the trial.

b) *Suitability of the process* (2°)

In establishing the need to evaluate whether or not a penal trial should be initiated, the canon makes an explicit reference to c. 1341, which states a fundamental principle of penal law: one must not proceed to impose or declare a penalty except after having verified that it is impossible to procure the purpose of the canonical penalty by other means. For example, if the purpose of the penalty is the reparation of damages, the restoration of justice and the correction of the delinquent member of the Church, and these ends can be achieved in another way, then the penalty should not be imposed. In such a case, the ordinary has an obligation *not* to begin a penal trial. However, c. 1718 is not an invitation for inaction in the face of an offense. Instead, it illuminates the fact that the ordinary is obligated, with pastoral charity and prudence, to intervene at the proper time, not only after the commission of an offense, but also beforehand, to prevent the offense and to avoid its harmful effects. In a matter of such importance for the salvation of souls and the welfare of the people of God, there is no place for negligence.

Among the pastoral means suitable for accomplishing of the objectives of a penalty, two specific ones are mentioned in c. 1341: fraternal evangelical correction (Mt. 18:15–17) and reprimand (the penal remedy referenced in c. 1339 § 2). Other means are referred to under the heading of pastoral concern. Among these latter means one finds the warning and the penal remedy that can be directed “toward that person who is found to be in the near occasion of committing an offense, or toward that person where, after an investigation has been conducted, there reappears a serious suspicion that he has committed an offense” (c. 1399 § 1). This type of admonition is optional, except as a necessary preliminary requirement for the valid application of medicinal penalties or censures and for the application of some expiatory penalties for determined offenses (cf. cc. 1371, 1394 § 1, 1395 § 1, 1396).

The use of the pastoral means mentioned is not obligatory *per se*, with the exception of the canonical warning in the cases indicated above. However, c. 1341 along with the spirit that animates it—and not excluding all the arrangements of the current penal ordinance set up for the safeguarding of communion—would be in vain if the ordinary were to disregard using such means and verify that their efficacy is evident. From the notification of the offense, or the knowledge of the existence of a situation occasioning the offense, the ordinary must begin a pastoral undertaking to either avoid the committal of the offense, or, the offense having already been committed, to obtain the amendment of the offender, the reestablishment of justice and the reparation of scandal.

In this perspective, insofar as we have emphasized the pastoral character of the canonical penalty, “it is suitable to stop to reflect upon *a misunderstanding,* perhaps understandable but harmful nonetheless, that often conditions the vision of the pastoral nature of ecclesiastical law.

Such a distortion consists in attributing significance and pastoral intentions solely upon those aspects of moderation and of humanity which can be related at once with *aequitas canonica*; that is to say, it consists in holding that only exceptions to the laws, the avoiding of recourse to trials and to canonical sanctions and the reduction of juridic formalities, have real pastoral importance. In this way one forgets that *justice as well as strict law* —and, as a consequence, the general norms, trials, sanctions and other typical demonstrations of legality, especially when found to be necessary— are demanded in the Church for the welfare of souls. *Therefore they are intrinsically pastoral realities.*"[1]

c) *Choice of an adequate method: judicial or administrative* (3)

The ordinary, having determined that a penal trial is both possible and appropriate, must make the decision as to the route to follow: judicial or extra-judicial. Canon 1342 § 2 considers the restraints against proceeding extra-judicially: "Perpetual penalties cannot be imposed or declared by means of a decree; nor can there be imposed those other penalties which the law or precept forbids their being applied by decree." Dismissal from the clerical state (cc. 290,2° and 1336 § 1, 5°) and the penal privation of office (c. 196) are perpetual by nature. The rest of the expiatory penalties can be perpetual (cf. c. 1336 § 1).

According to the text of the canon, it would seem that the choice of the extrajudicial or administrative route is relatively free, subject to few conditions. This interpretation is substantially modified when joining this canon with the provision given by c. 1342 § 1, which establishes that one can administratively proceed only if just reasons exist which *argue against* there being a judicial trial. This solution is consistent with the fundamental principles of the canonical system relative to the safeguarding of the common welfare of the Church and the protection of the fundamental subjective rights of the faithful.

2. *Subsequent revocation or modification* (§ 2)

The reason for its revocation and for its modification is the existence of new elements not previously known by the ordinary, or that were not even present at the moment of the decision (for example, the amendment by the accused). These new elements demand that a different decision be rendered. One here raises the question whether through determining "new elements" one can also understand a new outlook on the facts or a new formulation of the problem on the part of the ordinary that convinces him

1. JOHN PAUL II, "Discurso a la Rota Romana," January 18, 1990, in *L'Osservatore Romano*, January 19, 1990, p. 5.

to decide differently. It does not appear that these interpretations can be excluded.

The canon speaks of a revocation and a modification of the decree. By means of the revocation, which is done by means of another administrative act (cf. c. 47), the preceding decree ceases to have effect (cf. c. 58 § 1). The modification consists in the correction of the decree, while keeping its valid elements. The revocation and/or modification of the decree are accomplished through the initiative of the ordinary, or at the instance of the interested party (cf. cc. 57 and 1734 § 1).

Revocation and modification can refer to both the decision to put the trial into motion, as well as the decision to proceed judicially or extrajudicially. However, one cannot always repudiate or alter the contents of the decree. As a matter of fact, as far as the judicial process goes, once this has been initiated, it cannot be changed, and, if the promoter of justice were to request the abandoning of the court procedure by mandate of the ordinary, "for validity, the renunciation must be accepted by the accused person, unless he or she has been declared absent from the trial" (c. 1724 § 2). Moreover, if new elements appear during the trial through which "it becomes quite evident that the offense has not been committed by the accused, the judge must declare this in his sentence and acquit the accused" (c. 1726). The contents of this canon must also be applied, by analogy, when one is proceeding extrajudicially. Therefore, the unilateral decision of the ordinary is insufficient.

On the other hand, when the administrative procedure has started, it is possible to change over to the judicial route at any moment of the procedure—always with the provision that the decision was made before the judicial decree was issued.

3. *Suitability of consulting previously* (§ 3)

Because of the importance and seriousness of such decisions, the supreme legislator has considered it important to include § 3 that , while it does not set up an obligation of juridic nature, does express the necessity of attentively weighing all the circumstances.

By judges, we are obviously referring to ecclesiastical officers, not civil servants. The term *iuris periti*, on the contrary, leaves open the door to any expert in law —not necessarily in canon law— whose opinion can be useful to the ordinary. However, it is important to pay attention to the fact that the formulation of the canon requests that references either to the promoter of justice or to the investigator[2] not be made, although the canon does not prohibit their intervention. It seems that the reason for

2. Cf. *Comm.* 12 (1980), p. 190

such an exclusion is to avoid possible prejudices and, to that end, it is recommended to appeal to the opinion of experts who have not already taken part in the investigation, or who must take part later on in the trial in case the decision is made to put it into motion.

The *CCEO*, on the other hand, puts the obligation of listening to the accused and to the promoter of justice before deciding such questions (cf. c. 1469 § 3).

4. *Suitability of preliminary arbitral intervention* (§ 4)

In c. 1446, an exhortation is made to the faithful, *salva justitia*, to avoid trials and to settle litigations peacefully. The norm logically refers only to private cases, the object of which is at the free disposition of the parties, as is the case of the damages caused by the delict. It does not affect cases in which the public welfare of the Church or the salvation of souls is involved (cf. c. 1452 § 2), and in which the settlement of the compromise (cf. c. 1715 § 1) is unthinkable. The purpose foreseen by § 4 of c. 1718 is that of avoiding a trial for the indemnification of the damages caused by the delict or for the avoidance of bringing up that action which can be instigated both in the penal trial and in an autonomous manner (cf. c. 1729 § 1).

The decision about the importance of such an arbitral intervention is up to the ordinary, but the parties must give their consent because it is their respective duty to put into effect the action for the healing of the damage. This does not mean that the intervention of the ordinary is necessary for the legitimacy or the validity of the agreement, since the parties can come to an agreement at any moment through their own initiative (cf. c. 1713). The canon is mainly directed toward the ordinary so that, if he considers it suitable, he takes the initiative and exercises the role of mediation in the controversy.

With the arbitral judgment, one is evidently not dealing with entering upon the substance of the penal case. This arbitral judgment must be limited to settling the question of damages *ex bono et aequo*. On the other hand, carrying out this judgment does not affect the exercise of criminal action.

1719 **Investigationis acta et Ordinarii decreta, quibus investigatio initur vel clauditur, eaque omnia quae investigationem praecedunt, si necessaria non sint ad poenalem processum, in secreto curiae archivo custodiantur.**

The acts of the investigation, the decrees of the Ordinary by which the investigation was opened and closed, and all those matters that preceded the investigation, are to be kept in the secret curial archives, if they are not necessary for the penal process.

SOURCES: c. 1946 §2, 1° et 2°

CROSS REFERENCES: c. 489

COMMENTARY

Josemaría Sanchis

Archive of the acts of the investigation

1. If the ordinary decides against putting a trial into motion, then the acts should be filed in the secret archives of the curia. Reference is made to such an archive in c. 489.

2. As for the material which must be filed, the canon specifies: *a)* the acts of the investigation, that is to say, all the documentation gathered during the investigation; *b)* the decrees of the ordinary with which he initiated and concluded the investigation; and, *c)* all that preceded it: the knowledge of the offense, the possible announcement, the information gathered beforehand, etc. This matter will be filed only if it is not necessary for a penal process, administrative or judicial. If the ordinary has decided that he must proceed to the application of a penalty by means of an extra-judicial decree, he must let the accused know of the accusation and all the proofs presented in the brief, so he can defend himself (cf. c. 1720, 1°). If the ordinary has decreed to put the judicial process in motion, the acts of the investigation must be offered to the promoter of justice, who will present the written accusation to the judge (cf. c. 1721 § 1). All the acts of the investigation must be handed over, particularly those acts that may be necessary for the penal process, namely for the verification of the facts and the knowledge of the truth about the commission of the offense, its circumstances, the degree of imputability of its author and possible accomplices, etc. The determination of the necessary documents with regard to the sentence logically pertains to the judge or tribunal, who can ask the ordinary for the documents he considers necessary.

3. The motives for the decision not to start the penal procedure and to file the acts in the archives can be very diverse. In fact, it can be due to the innocence of the person being investigated, shown during the development of the investigation, the impossibility of accumulating sufficient evidence to initiate a trial, and the will of the ordinary, who has considered it inappropriate to proceed against the presumed author of the delict, despite the presence of sufficient proofs. In any case, the motives for the decision must be established in a document that will be attached to the summary in the archives.

CAPUT II
De processus evolutione

CHAPTER II
The Course of the Process

1720 **Si Ordinarius censuerit per decretum extra iudicium esse procedendum:**

1° reo accusationem atque probationes, data facultate sese defendendi, significet, nisi reus, rite vocatus, comparere neglexerit;

2° probationes et argumenta omnia cum duobus assessoribus accurate perpendat;

3° si de delicto certo constet neque actio criminalis sit extincta, decretum ferat ad normam cann. 1342–1350, expositis, breviter saltem, rationibus in iure et in facto.

If the Ordinary believes that the matter should proceed by way of an extrajudicial decree:

1° he is to notify the accused of the allegation and the proofs, and give an opportunity for defense, unless the accused, having been lawfully summoned, has failed to appear;

2° together with two assessors, he is accurately to weigh all the proofs and arguments;

3° if the offence is certainly proven and the time for criminal proceedings has not elapsed, he is to issue a decree in accordance with Cann. 1342–1350, stating at least in summary form the reasons in law and in fact.

SOURCES: cc. 1933 §4, 2225, 2233 §1

CROSS REFERENCES: cc. 134 §1, 368, 295 §1, 1342–1350, 1362, 1412, 1415, 1425 §1, 2, 1507 §3, 1509 §1, 1608, 1620, 1717–1719, 1724, 1726

COMMENTARY

Antonio Calabrese, cp.

This canon is complex and not without difficulties. It covers the entire extrajudicial process for the imposition or declaration of canonical penalties, from the moment the ordinary decides to adopt this procedure until the issuance of the penal decree.[1]

1. First of all, it is necessary to clarify which ordinary makes the decision to follow the extrajudicial route. That person is the ordinary who instigated the preliminary investigation which cc. 1717–1719 treated. However, while the ordinary can delegate another person for that preliminary investigation, he is the only one who can take responsibility for the decision about the route (judicial or administrative) that must be followed, who possibly will make use of the counsel of expert and competent persons.

By the word "ordinary" is meant all those included in this title in the law: diocesan bishops and those who are the equivalent insofar as they are put in charge of a particular Church, including territorial prelates, territorial abbots, vicars apostolic, apostolic prefects, administrators of stably erected apostolic administrations (cc. 134 § 1 and 368), military ordinaries (*SMC*) and personal prelates (c. 295 § 1). vicars general and Episcopal vicars, with the consent and with the mandate of the diocesan bishop, must also be included (c. 134 § 1). With respect to their own subjects, major superiors of clerical religious institutes of pontifical Right should be understood to enjoy at least ordinary executive power (c. 134 § 1).

The ordinary of the place is the ordinary of the domicile or the quasi-domicile, or of the place where the delict was committed (cc. 1408 and 1412). For religious of clerical pontifical right, there will be their proper ordinary or major superior, but the ordinary might also be the ordinary of the place where the delict was committed. Due to prevention, the right to judge belongs to the ordinary who was the first to cite the accused legitimately (c. 1415).

2. The analysis of the procedure that has to be followed must not leave out the various considerations for which the ordinary can avail himself of the opinion of persons who are expert and competent.

a) A delict for which the law has not provided a need for a judicial process must be handled effectively. There are also delicts that bear attached penalties for whose imposition or declaration there is required, for validity, the judicial trial. According to c. 1342 § 2, perpetual penalties cannot be inflicted or declared in an extrajudicial procedure, nor can they be

1. *I procedimenti speciali nel diritto canonico* (Rome 1992), pp. 233–281.

inflicted or declared for delicts for which the law or precept that establishes them prohibits them from being applied by decree. For example, the dismissal from the clerical state, for ever, can only be imposed through the judicial trial, before a tribunal composed of three judges and, in more difficult cases, of five, according to the judgment of the ordinary (c. 1425, § 1,2°).

Some penalties are perpetual by their very nature, like dismissal from the clerical state or privation from an office; others can end up that way by the provision of the law. Perpetuity has reference only to expiatory penalties, called vindictive in the past. It never refers to medicinal penalties (excommunication, interdict, suspension), because these endure only during the time of the contumacy of the accused, or where the subject persists in his bad will or delict. These matters must be forgiven in the external forum or absolved in the internal forum, when the contumacy ceases (c. 1358 § 1). The contumacy ceases when the accused truly repents of his delict and has performed suitable reparation for the damages or scandal, or at least has seriously promised to do so (c. 1347 § 2).

There are offenses for which the law provided, in addition to a penalty *latae sententiae*, the placing of other penalties *ferendae sententiae*, extending it even to the point of dismissal from the clerical state. In these cases, it does not appear that the ordinary can choose the extrajudicial route, precisely because of the possibility of imposing dismissal from the clerical state, which cannot be imposed through this route. However, it can be tolerated that one can do it if he intends to limit himself solely to the imposition of the lesser penalties. If the extrajudicial route is adopted, the later step to the judicial route for the imposition of the maximum penalty does not seem possible.

b) Moreover, the ordinary must have valid motives that are opposed to the judicial route. According to c. 1342 § 1, as long as just reasons exist which are opposed to the judicial route, one can proceed by the extrajudicial route. This means that the Code prefers the judicial route and wants it to be followed normally, except when just reasons exist which indicate the opposite. It appears, then, that the Code itself presents the judicial route as that which offers greater guarantees in its procedural system.[2]

The just causes that permit the following of the extrajudicial or administrative route have to be opposed to the judicial route (*obstent*); they cannot simply be reasons that argue for following the other route. Thus, for example, the greater expeditiousness of the administrative way does not appear to be a just cause, nor does the urgency to punish the accused and to reestablish justice and the order that has been damaged appear to be a just cause, because neither the one nor the other are hindrances for

2. V. DE PAOLIS, "L'applicazione della pena canonica," in *Monitor Ecclesiasticus* 114 (1989), p. 93.

the judicial route.[3] On the other hand, in view of all its requirements, it is doubtful that the extrajudicial route is more expeditious than the judicial.

c) In the light of the preceding considerations and of any others that circumstances can suggest, the ordinary will decide to adopt one route or the other. If he decides to adopt the extrajudicial route, he issues a decree with which he declares the beginning of the proceedings, specifying that the procedure to follow is the extrajudicial one and designating the person who must conduct the procedure to its completion (c. 1718 § 1, 3°).

He can pursue the action himself, but, in his dealing with the inflicting or the declaring of penalties, it is more pastorally suitable to delegate another priest, preferably the judicial vicar, who has been institutionally appointed to handle canonical procedures. In every case, it is proper that the bishop not delegate the one who has carried out the preliminary investigation. The reason is not that the bishop is expressly ordered to do so, as happens in the case of the choice of the judicial route (c. 1717 § 3), but through analogy with that arrangement. That is to say, the reason exists in virtue of the same principles that are found in the origin of that prohibition and which appear to be rooted in the need of having at one's disposal an impartial person, not predisposed because of the results of the previous investigation.

3. Whoever conducts the proceedings must inform the accused of the accusation and the proofs against him, and he must give him the possibility of defending himself.

The notification must be done in writing, but the accused must always be called in so that he may be orally notified or so that the accusation and the assembled proofs may be read to him. After this reading, the notification is put into writing and the text will be offered to him. This must be duly signed by the one conducting the proceedings and, insofar as possible, by the notary.

The summons must be performed in due form. This means that he has to be notified by means of a citation through the postal service or another absolutely secure way as happens in the case of judicial notifications (c. 1509 § 1). The formal citation has relevance in the case of the absence of the accused. The citation ceases being as important (c. 1507 § 3) if he himself makes his appearance, although he has been cited in another way —even by telephone— or if he appears spontaneously, for example, because he has heard that his case is being talked about, or simply because by chance he was located in that vicinity for other reasons. At all events, it is necessary that they let the accused know that a procedure against him is underway. The citation has juridic effects for this reason.

4. A most important element is the "faculty" to defend himself, which has to be conceded to the person being accused. "Faculty" in this case is

3. A. CALABRESE, *Diritto Penale Canonico* (Milan 1990), pp. 145ff.

synonymous with right. The accused would also be able to renounce exercising this right for different reasons. For example, some possible reasons could be the delict imputed to him and the proofs are evident, or even out of disdain for the ecclesiastical authority, or through a conviction that it will never be possible to prove the delict that they attribute to him.

In every case, even when the delict and the imputability are evident, the possibility to defend himself must be given to him. The right to defense in any juridical system is one of the pivots of the penal trial, and this is also true in the juridical system of the Church, both when it proceeds along the judicial route and when it adopts the extrajudicial route. Nobody can be condemned or suffer penalties without the possibility of defending himself. The canonical process that has not given that possibility to the accused must be declared null (c. 1620, 7°).

5. The ordinary, or the person designated by him, brings to the attention of the accused the delict that is attributed to him as well as the proofs already assembled. The dialogue can clarify obscurities, uncertainties and discrepancies. Of course, it is possible in this phase to free the accused from total responsibility and to declare him innocent. However, if the verbal defense and the interchange do not establish the innocence of the accused, but the proofs are still strong, he continues with the trial.

Nevertheless, the ordinary can suspend action at any moment, be it at the beginning or in an advanced stage of the trial (cf. cc. 1718 § 2, 1724 § 1, 1726).

The interrogatory might not be sufficient for the defense, in the judgment of the accused, especially when he has learned about the accusation just at that very moment. If he asks for time to prepare the defense, even in writing, the ordinary must concede this to him, so long as the time requested is reasonable. When that time has expired, the ordinary again cites the accused to clarify the most recent matters that might have come to light in the interrogatory, both from the accusation and from the defense. If, in the judgment of the ordinary or of the accused, the second interrogatory has not clarified matters, the accused has the right to other interrogatories, eventually preparing new proofs to complete his defense. However, the petition for new interrogatories that only tend to delay the proceedings must be rejected.

Each interrogatory must be put into the acts and the accused, the ordinary and the notary must sign them.

However, if the accused, though duly cited, does not appear, the ordinary still goes ahead. What this means is that the accused is refusing to defend himself or he is acting as if he were renouncing a defense.

At this stage, the intervention of the advocate is not admitted. The accused must personally defend himself in the interrogatories. Yet, he can consult advocates and experts beforehand, especially if he is adding a written defense to his oral answers.

6. After having questioned the accused and having received his written defense, the ordinary chooses two assessors who are expert and of honorable conduct (cf. c. 1424). With these persons, he carefully evaluates all the assembled documentation: the accusation, the proofs, the arguments and the defenses.

This is the most important, the most delicate and the most difficult moment, since it is the phase in which the ordinary makes the decision of convicting or absolving the accused. The help of the two assessors, who ordinarily are judges of the tribunal, permits him to make a just decision. To evaluate adequately the accusation and the proofs, the arguments and the defenses, the technical contribution of the consultors and their judicial and legal experience, is necessary, particularly when the ordinary, in the situation where he is the one who directly initiates the actions, does not have an adequate knowledge of the law nor judicial experience. These considerations must constitute a recommendation to the ordinary not to undertake the trial personally, but to designate his judicial vicar or another expert priest to do so.

In any case, the intervention of the two assessors is always necessary, even if the trial is being directed by the judicial vicar or by another priest. In practice, the judgment about the innocence or the culpability of the accused is made collegially, even though the judicial vicar or the priest *ad hoc* are the ones responsible in the eyes of the accused and all of those who have an interest in the case.

7. With the evaluation of the accusations, the proofs, the defenses and all the circumstances, the ordinary or the person designated by him must be in a position to issue a judgment of acquittal or of guilt.

a) Before everything else, it must be known with certainty that the delict has been committed. The certainty demanded is moral, and it must be attained from the acts and the proofs (c. 1608 §§ 1–2). A personal conviction does not suffice, nor do secret reasons or proofs, though recognized by the ordinary or his delegate but not brought forward as proofs nor presented to the accused.

Moreover, it must be known with certainty that the delict is imputable to the accused, not only materially, but also morally. Therefore, there will have to be an evaluation of the circumstances that diminish or eliminate imputability (c. 1345).

In the decree, the ordinary must show, at least in a concise way, the reasons of law and the facts of the case, beginning with those by means of which he has arrived at moral certitude.

If there remains a doubt as to the material imputability or the moral imputability —and with greater reason if there is a doubt about both— the accused cannot be found guilty. In such a case, the ordinary must issue a decree concluding the criminal action (c. 1718 § 2). However, if it has been

pointed out with evidence that the delict was not committed by the accused, the ordinary, at any point in the trial, must issue a decree of acquittal (cf. c. 1726).

b) Before issuing the penal decree, the ordinary or his delegate must also examine whether the criminal action has been extinguished through prescription. If it has expired, he cannot proceed to the sentence, but immediately a decree of the cancellation of the criminal action must be issued (cf. c. 1362 § 1). If it has not been extinguished, a penal decree is issued.

8. If the delict is certain, as well as its imputation to the accused, and if the criminal action has not been extinguished, the ordinary issues the decree by which he imposes the provided penalty. If what is being treated is the penalty *ferendae sententiae*, or when the accused has fallen into a penalty *latae sententiae*, he will properly declare it so. However, he must observe the norms of cc. 1342–1350 (the prohibition against imposing or declaring perpetual penalties by decree, of imposing a censure without a previous warning, *etc.*), and he must reveal, at least briefly, the reasons of law and of fact in the same decree.

The decree follows, then, the model of a sentence, but it is not a sentence. Therefore, the norms that establish the curable and the incurable defects of the sentence do not apply, but the norms that refer to administrative acts do apply. Thus, if a decree were to omit the explanation providing the reasons of law and of fact, it would still be valid, although it can be challenged through an appeal by reason of a violation of the law (a violation of n. 3° of the canon upon which are commenting) *in decernendo*.

The disclosure of the reasons of law and of fact is the most delicate part of the entire procedure. To accomplish this, knowledge of law in the broadest sense of the word is required. Also required —especially in the evaluation of the facts— is a knowledge of psychology and of human conduct, wisdom in the consideration of the attenuating circumstances, excusing or aggravating circumstances, prudence, impartiality, good sense, and, above all, a pastoral and priestly sense, which must put a characteristic note of mildness and Christian goodness upon the application of penalties.

In the case in which the accused turns out to be innocent, the decree of acquittal must be issued (cc. 1342 § 3 and 1726).

The formula *constat* or *non constat* in the dispositive section is valid, since the Code uses that same form in these expressions: *si de delicto certo constet...* (c. 1720, 3°), *si evidenter constet delictum non esse a reo patratum* (c. 1726). However, in a decree of acquittal, the phrase *non constat* might be interpreted as leaving the matter in doubt, unless other terms are added to indicate a certainty. For this reason, it would be better not to use it. If it is used, it must be understood as a full absolution or as a proclamation of the innocence of the accused.

1721 **§ 1. Si Ordinarius decreverit processum poenalem iudicialem esse ineundum, acta investigationis promotori iustitiae tradat, qui accusationis libellum iudici ad normam cann. 1502 et 1504 exhibeat.**

§ 2. Coram tribunali superiore partes actoris gerit promotor iustitiae apud illud tribunal constitutus.

§ 1. If the Ordinary decrees that a penal judicial process is to be initiated, he is to pass the acts of the investigation to the promotor of justice, who is to present to the judge a petition of accusation in accordance with Cann. 1502 and 1504.

§ 2. Before a higher tribunal, the promotor of justice constituted for that tribunal adopts the role of plaintiff.

SOURCES: § 1: cc. 1934, 1954, 1955

CROSS REFERENCES: cc. 134 § 1, 1425 § 1, 2°, 1430, 1502, 1504, 1514, 1533

COMMENTARY

Raffaele Coppola

1. This canon directs the attention of the responsible bodies[1] toward the judicial *iter*, which is detailed and, of course, mindful of human rights. Still, administrative trials are also traditionally characterized in the Church through the search for truth and in forms that clearly resemble properly judicial trials.

It belongs to the promoter of justice to initiate the penal judicial trial by means of a document in accord with cc. 1502 and 1504. He takes the steps referred to in this canon, steps that are similar to those for the ordinary contentious trial. Those are found, as always, in the norms classified in their own section. This commentary shall essentially refer to these, resorting to the appropriate source for a close study of the common norms, which include the canons about trials in general.

In the case of the ordinary's choice of the judicial route, this canon delivers the acts of the previous investigation to the promoter of justice. This is indispensable for initiating the flow of action and for ensuring the

1. Cf., on the preparatory work on the *CIC*, *Comm.* 9 (1977), pp. 161–162; 12 (1980), p. 190.

correct formulation of the accusation. The position of petitioner in the trial is reserved for the promoter of justice, who does not appear in the stage of the investigation (not the same as in the *CCEO*: c. 1469 § 3): "The legitimacy of acting against the respondent who is accused of a delict and before the judge" belongs exclusively to him,[2] now that (since the Pio-Benedictine Code) the popular criminal action (in its development in the ancient law), open to anyone of the faithful, has been ignored.

The promoter of justice, who has the duty to safeguard the public welfare (c. 1430), as a general procurator —a public ministry in the name of the Church— therefore has a monopoly on the criminal action, together with the further duties derived from it. These duties are to support the accusation, to procure the proofs and to put forth an appeal in the cases considered by the law.

For this reason, it is important to emphasize that the preliminary investigation (cf. cc. 1717–1719) is to prepare for the accusation in the new process; it is not only for the acquisition of proof. It is an investigation directed by the ordinary along the determined prescriptions inherent in the exercise of the criminal action.[3] The elements that the ordinary collects for this purpose, even through suitable persons, have value within the interior of the pre-procedural phase, for the purpose of possibly deciding whether he will proceed by means of an extra-judicial decree; of deciding upon the filing of the acts into the archives; and of determining the unsuitability or suitability of the trial—the latter case including the formulation of the accusation on the part of the promoter of justice. However, these matters do not have value in the trial itself, that moment in which the judge is called upon to pronounce upon the substance of the case, finding the accused guilty or acquitting him.

That rule has no exceptions in the canonical system. Such exceptions do not exist, not even through a reference to the acts that led to the definitive acquisition of probatory information (called in other places *through surprise, perplexity or confusion*). Like judicial inspections, they *always* pertain to the procedural phase (c. 1582). It is from that situation that a form of trial, meticulously inspired by the principle of equality for the means of defense between the accusation and the defense, results. Also, there is another result in that fact that, in this necessary revision, both the confidentiality about the actions of the preliminary investigation and the fact that there was not offered any defensive participation regarding the actions of the ordinary or of his delegate, evidently acquire a distinct meaning, neither in the *CIC* nor in the *CCEO* (in which there is also

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2. F. LOZA, commentary on c. 1721, in *CIC Pamplona*.
3. Cf. C. VENTRELLA MANCINI, "L'indagine previa nel processo penale del Codice di Diritto canonico della Chiesa latina e delle Chiese orientali," in R. COPPOLA (Ed.), *Incontro fra canoni d'Oriente e d'Occidente. Atti del Congresso Internazionale*, 2 (Bari 1994), pp. 543–556.

provided the interview of the person being investigated, and, in addition, the interview of the promoter of justice: *CCEO*, c. 1469 § 3).

The study of the function of the accusation, as it results from c. 1721's treatment of the area bordering between the preliminary inquiries and the judicial trial, is useful for the assessment of the system adopted by the code. This undoubtedly follows the route of the accusatory public process, which, combined with other forms, for centuries had force and consistency in the Church. After the French revolution, with the overcoming of the inquisitorial procedure of the Ancient Regime, it passed to the ordinances of the western states of democracy.[4] Apart from that, in the Pio-Benedictine Code, the inquisition did not follow the footsteps of the classical inquisitorial trial (the sameness of terms is only nominal), but a form of mixed process[5] began, with the prevalence of the accusatorial element, substantially adopted into not a few juridical ordinances.

2. With the accusation of the promoter of justice joined to the petition, the process, with all of its effects, has begun. Moreover, the *personal element* is constituted by the presence of someone with the status of the petitioner (the procedural representative of society, directly interested in the mending of the public damage caused by the delict), by the presence of the respondent (the one being accused) and by the presence of the judge. The *material element* of the criminal action is the declaration or the imposition of a penalty, according to which the delict is punished with a penalty *latae sententiae* or *ferendae sententiae*. Finally, the *causal element*, or the title of the action, is the presumed commission of the delict and the imputability of the delict because of which the member of the faithful stands accused.[6]

Passing to the written content of the accusation, with which there is introduced a penal case (something which has importance principally from the viewpoint of its concrete appearance), certain material must be present in the interchange: *a)* it must indicate to the judge before whom the cause is being introduced, what the penalty is that he has to apply and who is the presumed author of the delict; *b)* it must indicate, at least in a general way, the juridical basis of the claim and upon what facts and proofs the promoter of justice bases his case in order to prove his statements; *c)* it must be signed by the promoter of justice, showing the day, month and year in which it has been written, also the place where he has his domicile for the purpose of receiving notifications; *d)* it must show the domicile or quasi-domicile of the accused.

4. Cf., for a different view, F. CORDERO, *Procedura penale* (Milan 1993), pp. 21ff.

5. Cf., among others, J. BRYS, *Iuris canonici compendium*, II (Brugis 1949), p. 369; M. CONTE A CORONATA, *Institutiones Iuris Canonici*, III (Torino 1956), pp. 473ff.

6. Cf., except for the adaptations of the text, M. CABREROS DE ANTA, *Comentarios al Código de Derecho Canónico*, III (Madrid 1964), p. 675.

When treating penal controversies, it must be observed that in the acts that have been sent him by the ordinary (who can also be the major superior of a religious institute or of a clerical society of pontifical right), the promoter of justice learns the basis for the accusation and the basis for the competence of the judge. Such issues arise in the case of delicts that can be punished with dismissal from the clerical state, or in cases initiated to inflict or declare excommunication, where there must be a collegiate tribunal of three members (c. 1425 § 1,2°). However, if the ordinary did not exclusively indicate the judge before whom the accusation has to be presented, it is understood that the action has to be opened before the judge of the place in which the promoter of justice performs his office.[7]

The exclusivity of the promoter of justice's function regarding his special relationship to the ordinary is confirmed by § 2. The function of petitioner is exercised by the promoter of justice, constituted before the higher tribunal, "whether in the court of receiving the petition or in the court of accusation." Those words disappeared in the course of the preparatory editing of the code, because they were considered superfluous. However, not less superfluous is the expression "taking the part of the petitioner" where the consultors, in a certain stage of their labors, would have liked to have made an addition through an incidental clause in § 1 of c. 1721[8]. They wanted to avoid the erroneous interpretation according to which the promoter of justice would fulfill the function of petitioner only before the second instance tribunal.

7. Thus, but with reference to the *CIC*/1917, M. LEGA, *Commentarius in iudicia ecclesiastica*, V. BARTOCCETTI (ED.), III (Rome 1950), p. 281.
8. Cf. *Comm.* 12 (1980), p. 193.

1722 **Ad scandala praevenienda, ad testium libertatem protegendam et ad iustitiae cursum tutandum, potest Ordinarius, audito promotore iustitiae et citato ipso accusato, in quolibet processus stadio accusatum a sacro ministerio vel ab aliquo officio et munere ecclesiastico arcere, ei imponere vel interdicere commorationem in aliquo loco vel territorio, vel etiam publicam sanctissimae Eucharistiae participationem prohibere; quae omnia, causa cessante, sunt revocanda, eaque ipso iure finem habent, cessante processu poenali.**

At any stage of the process, in order to prevent scandal, protect the freedom of the witnesses and safeguard the course of justice, the Ordinary can, after consulting the promotor of justice and summoning the accused person to appear, prohibit the accused from the exercise of the sacred ministry or of some ecclesiastical office and position, or impose or forbid residence in a certain place or territory, or even prohibit public participation in the blessed Eucharist. If, however, the reason ceases, all these restrictions are to be revoked; they cease by virtue of the law itself as soon as the penal process ceases.

SOURCES: cc. 1956–1958

CROSS REFERENCES: cc. 128, 1417, 1729–1731, 1732

COMMENTARY

Raffaele Coppola

1. Without a doubt, c. 1722 must be framed within the affirmation of justice in a broad sense. If one makes an exception for cc. 1720 and 1721 (with regard to, respectively, the extrajudicial mode and the function of the promoter of justice), c. 1722 is the only canon that, within the scope of the development of the trial, openly directs itself toward this end, so that the norms leading to the protection of the rights and interests of the faithful always predominate.

Safeguarding justice is fundamental in the life of the Church, as in every organized society. "The process tends to establish justice in the community once again. The trial defends justice by means of the imposition of penalties or declaration or delictual acts that can put that justice into danger. What is being dealt with is the safeguarding of the public welfare which cannot be ignored."[1]

1. V. De Paolis, "Il processo penale nel nuovo Codice," in *Dilexit iustitiam. Studia in honorem Aurelii Card. Sabattani* (Vatican City 1984), p. 490.

On the other hand, it is advisable to remember that the norms regarding the protection of the rights of the subjects are not opposed to the proper functioning of justice. This especially holds when the temptation toward an inquisition starts to make its appearance in civil society because of the vertiginous growth of the crime rate. If such rights are not adequately protected, both civilly and, with greater reason, in the Church, when it is granted that such a functioning would end up with the Church yielding its preeminent position with regard to its catalogue of virtues.

In the canonical system, the responsibility for the interests involved here belongs primarily to the ordinary who has the obligation of deciding whether to begin the trial (see commentary on c. 1721). He also has the obligation of indicating the route that has to be followed, keeping constantly present the priorities revealed in the juridical-ecclesial overall plan, as well as the hypersensitivity of the matter. It is precisely in this context that the present norm must be interpreted. This norm was appropriately shifted from the final part of the *Schema* to its present location.[2] It has been accepted by the *CCEO* in the same way.

The norm artificially reproduces the cc. 1956–1958 of the previous Code. Some cautionary measures are placed at the disposition of the ordinary, *not the judge.* These measures had for their purpose a guaranteeing of the protection of justice, the preventing of scandal, and the safeguarding of the liberty of the witnesses. Those measures, which have to be adopted by decree at any stage of the trial after the promoter of justice has been heard and the accused has been cited, can consist in the withdrawal of the accused from his priestly ministry or from an office or an ecclesiastical assignment. Alternatively, they can also consist in the imposition of or the prohibition from residing in a certain place or territory, or in the prohibition to participate publicly in the sacred Eucharist. It has to be pointed out that the formula "participation in the Holy Eucharist" which one encounters in the *CIC*/1917 was not accepted into the 1983 Code, although it was retained in the basic text proposed for the work in reforming the Code. Neither was the expression "he should paternally and earnestly persuade him not to stay in some place"[3] advanced to the level of consultation.

In every case, once the reason that has determined them disappears, these measures must be removed, by means of a decree. With the closure of the trial, they are *ipso facto* dropped. Therefore, they are temporary measures of an administrative nature that point to the good progress of the penal trial, its goal being the consistent carrying out of ecclesiastical justice.

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2. Cf. *Comm.* 12 (1980), pp. 193–194.
3. Ibid., p. 194

2. A useful study of cases of conscience does not exist which, without diminishing its importance, would offer in creative form the image of a branch of the living law.[4] Therefore, in this circumstance as in others, there is no allowance for in-depth statements like those that can be given in other parts of canonical wisdom, such as administrative justice. Such in-depth statements would be matters relating to organizations and, especially, the field of marriage. Nevertheless, it is possible to assemble some problems of a practical character, selected from among those which have been verified or could be proposed under the force of the previous Code, and which continue to be contemporary today.

The first case refers to the hypothesis of a sentence of full acquittal after the adoption of one of the measures of a prudential nature contained in this canon. The revocation of those measures, or their suspension coinciding with the extinction of the trial, does not exclude from the possibility —prescinding now from the eventual penal consequences (cc. 1390–1391) — of there arising the question of the indemnification of the damage in favor of the one being charged but unjustly accused, whatever would be the title under which the criminal action has been construed. The question, which urges caution in revealing the "knowledge of the crime" (think of the case of an accusation founded upon a denunciation corroborated by false documents, or because of insincere testimonies), has to be resolved positively in accordance with the general principles in c. 128, according to which whoever illegally, by means of a juridic act, or even with any act placed with deceit or fault, causes damage to another, is obligated to repair the injury caused.[5]

The second question that should be mentioned refers to the possibility of making recourse against those "decrees" of the ordinary. In this respect, the Code maintains silence, just as do the preparatory works for the new Code that have been published so far. However, some, in virtue of the unchanged value of canonical tradition, invoke the *CIC*/1917.[6] Thus, there is an inclination not to admit a recourse of this type by complying with the obligatory tone of the old c. 1958 ("against the same no remedy of law is available").

Here the negative opinion seems deserving of attention, when one considers that those decrees are not issued in the external extra-judicial forum (cf. c. 1732) and that there is the need for a rapid and effective development of the process. Nevertheless, it is essential to point out that there is always room for a petition of appeal ("*provocatio*") to the Apostolic See. However, the challenge by reason of c. 1417 (cf. c. 1596 *CIC*/1917) does not

4. Cf. P. CIPROTTI, "Il Diritto penale della Chiesa dopo il Concilio," in *La Chiesa dopo il Concilio. Atti del Congresso Internazionale di Diritto canonico*, I (Milan 1972), p. 529.

5. Cf. among the numerous commentators, L. CHIAPPETTA, *Il Codice di Diritto canonico. Commento giuridico-pastorale*, I (Naples 1988), pp. 169ff.

6. Cf. F. LOZA, commentary on c. 1722, in *CIC Pamplona*.

have suspensive effect. Theoretically, the one appealing can also be the promoter of justice, where he would naturally have always expressed an opinion opposed to the decision of the ordinary.

Welcoming the direction of an illustrious master of the law, one recognizes how these decrees can be considered, "in the first place they must convey the idea that in no way does it intend to prejudge the case on the basis of merit, but only to keep the Christian people from ever suffering harm or grave offense."[7] What is being dealt with are the conclusive affirmations based on a broad and serious line of reasoning, in accord with the matters already known, even though they were formulated a long time before the revision of the *CIC*/1917.

7. M. Lega, *Commentarius*...

1723 **§ 1. Iudex reum citans debet eum invitare ad advocatum, ad normam can. 1481 § 1, intra terminum ab ipso iudice praefinitum, sibi constituendum.**

§ 2. Quod si reus non providerit, iudex ante litis contestationem advocatum ipse nominet, tamdiu in munere mansurum quamdiu reus sibi advocatum non constituerit.

§ 1. When the judge summons the accused, he must invite the latter to engage an advocate, in accordance with c. 1481 § 1, but within the time laid down by the judge.

§ 2. If the accused does not do this, the judge himself is to appoint an advocate before the joinder of issue, and this advocate will remain in office for as long as the accused has not engaged an advocate.

SOURCES: § 1: *SN* can. 536

CROSS REFERENCES: cc. 221, 1481–1490, 1620, 7°

COMMENTARY

Raffaele Coppola

1. This norm must be put into an immediate relationship with c. 1481 § 2, since it constitutes the logical perfection and application of that norm. In virtue of the combined provisions of these canons —which meet their perfect match in their equivalent canons of the *CCEO* (c. 1474 and 1139 § 2)— the presence of an advocate or defender is always obligatory in penal trials.

In the contentious trials, with the exceptions considered by the law, there prevails the principle of the freedom of the party to choose to defend himself, unless the judge considers it necessary to proceed in another way (cf. c. 1481 §§ 1 and 3) because of the special difficulties which he notes. In the penal trial, the opposite principle rules. This happens in view of the fact that the person being charged, no matter how much he is in control of himself, does not enjoy the tranquility or objectivity of thought that would permit him to take care of himself in an adequate fashion.

For that reason, when the accused, notwithstanding the invitation of the judge, neglects to name an advocate within the established time, the judge himself designates an advocate *ex officio* before the joinder of issues. Obviously, the *auxiliary* defender (the term *ex officio* refers to a

discredited figure, at least in the tradition of governmental ordinances)[1] ceases in his function when a defender of trust has been named.

Based on what has been explained, one clearly understands that the absence of the *advocate* (even without the lack of cooperation from the person being indicted) sets in place the irremediable nullity of the sentence (c. 1620, 7°). "Advocate" is here taken in the sense of the ecclesiastical tradition, the person "approved by competent authority, with the duty of holding forth or arguing in behalf of parties in a trial, responsible for deductions of law and fact in written form or delivered by word of mouth."[2] His figure, broadly elevated, and notwithstanding many gray areas, is different from that of the procurator or proxy *ad litem*, possessing representative duties (not of the types that are technical-juridical), who "takes the place of his client as if he were his *alter ego*."[3]

The Supreme Pontiff John Paul II has authoritatively stressed this inviolable legal principle (*which in the penal process is identified with the office of the patron*) in his January 1, 1989 allocution to the Roman Rota. The Holy Father came to the conclusion that "it cannot be conceived that there could be a just trial without the contradictory defense, that is to say, without the concrete possibility, granted to each party in the case, of being heard and of being able to know and to contradict the questions, the proofs, and the deductions adduced by the opposing party or by the party *ex officio*."[4]

The concept of technical defense as an inviolable right in any phase or stage of the procedure is inherent, for this reason, in the ordinance of the penal canonical trial, in the sense that that right must be effectively guaranteed at any moment of the evolving of the trial.

2. Independently from some concomitant problems, the right to the defense from the systematic viewpoint, (which is understood as the broadest freedom as the trial runs its course) pertains to the type of *public subjective rights*, "in order to use a terminology elaborated through the public law of the state but is also susceptible to being used without risks in the canonical system."[5]

This guidance appears in harmony with the entire reorganization effected by the Council and by the new Code of an institutional idea that had cleared a way to well known interpretations concerning the purpose of

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1. Cf. F. CORDERO, *Procedura penale* (Milan 1993), p. 276.
2. G. COCCHI, *Commentarium in Codicem Iuris Canonici. Liber IV De processibus* (Turin 1940), p. 130.
3. L. CHIAPPETTA, *Il Codice di Diritto canonico. Commento giuridico-pastorale*, II (Naples 1988), p. 605.
4. Cf. *AAS* 81 (1989), pp. 922–923.
5. L. DE LUCA, "I diritti fondamentali dell'uomo nell'ordinamento canonico," in *De iure subiectivo deque eius tuitione in Iure canonico. Acta Congressus Internationalis Iuris canonici* (Rome 1953), p. 91.

the Church and of the individual faithful. These ideas would condition any evaluation. Opposed to these interpretations proposed after Vatican II,[6] there remains a codification of a series of rights and duties, even in this area (c. 221), as an objective for an authentic movement for the recognition and protection of the fundamental rights in the Church. These take their source from the principle of true equality, in virtue of baptism, with regard to dignity and action, through which all the faithful join together for the building up of the Body of Christ according to the condition and office proper to each (c. 208).[7]

The fundamental criterion for ecclesial communion naturally does not permit a formulation of the right to the penal defense with the view of the opposition of the individual against the state. That formulation is made with regard to his subjective public rights.[8] That is true even when one accepts that, in the same field of private law, attention must be centered more on the obligations or the duties of the other subjects than upon the right of the titular, in the framework of the typically canonical juridical relationship. The attention is directed toward the overcoming of the conflicts and is conceived, therefore, as a comprehensive participation of all concerned.

There could be an intensely personalistic objection to this idea to the effect that the penal trial necessarily offers the opportunity of verifying the faulty attention paid to one of the aforementioned fundamental rights. Such a situation is that of knowing who is the accuser, according to a perspective that appears to be in line with the suggested abandonment of the inquisitorial style. The principal directives of the revision of the *CIC*/1917 say nothing in this respect,[9] but there was a discussion about it in the commission with regard to c. 385 of the *Schema*: "Some have proposed —one reads in the final notations about the criminal trial— that in paragraph one the order should be given to the judge to make known the name of the accuser. The Consultors did not like the suggestion, because the manifestation of the name of the accuser does not seem suitable. In fact, sometimes it can be harmful. For it is necessary that the investigations be made and that proofs be had about the delict. If the accusation were considered as a proof in the trial, then the accuser becomes a witness and, as a witness, his name must be revealed."[10]

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6. Cf. P. FEDELE, *Discorso generale su l'ordinamento canonico* (Padova 1941, repr. (Rome 1976).

7. Cf. *Il diritto alla difesa nell'ordinamento canonico* (Vatican City 1988).

8. Cf., for the development and the necessary clarifications with reference to the canonical system, E. CORECCO-N. HERZOG-A. SCOLA (Eds.), *Les droits fondamentaux du chrétien dans l'Église et dans la société* (Fribourg-Freiburg i. Br.-Milan 1981), *passim*.

9. In the same direction, for some points regarding the doctrinal debate, cf. V. DE PAOLIS, "Il processo penale nel nuovo Codice," in *Dilexit iustitiam. Studia in honorem Aurelii Card. Sabattani* (Vatican City 1984), pp. 491–492.

10. *Comm.* 12 (1980), p. 194.

The reasons given by the Commission are equally shared among them, and, for the main part, they do not find themselves disagreeing about the clear separation, typical of the accusatory style, between the stage of the preliminary investigation and the procedural phase. As an institution, they avoided attributing to the judge when he is "*in limine litis*," a function which does not pertain to him.

1724 **§ 1. In quolibet iudicii gradu renuntiatio instantiae fieri potest a promotore iustitiae, mandante vel consentiente Ordinario, ex cuius deliberatione processus promotus est.**

§ 2. Renuntiatio, ut valeat, debet a reo acceptari, nisi ipse sit a iudicio absens declaratus.

§ 1. At the direction or with the consent of the Ordinary who decided that the process should be initiated, the promotor of justice in any grade of the trial can renounce the instance.

§ 2. For validity, the renunciation must be accepted by the accused person, unless he or she has been declared absent from the trial.

SOURCES: —

CROSS REFERENCES: cc. 1524 § 3, 1592

COMMENTARY

Raffaele Coppola

In this canon, the Code takes a position on a delicate question referring to the relationship between the ordinary and the promoter of justice. The rule that results is the following: when the beginning of the process is decided by the ordinary, the promoter of justice cannot renounce the instance absent the mandate of the bishop or his approval. Although the promoter of justice's autonomy in securing the public welfare resists being described as the mere proxy of the ordinary, there is no doubt that his affirmed independence in the *exercise* of the criminal[1] action suffers an infringement in virtue of this important provision.

Taking into account the scope of the duties of the ordinary, namely, the priority of his commitment to the protection of the good itself, one is probably facing here an unavoidable exception. However, this means nothing more than the need for an agreement (in the absence of a formal mandate) when from the acts and allegations there emerges the presumable innocence of the person being charged.

Therefore, the renunciation of the instance represents in the law of the Code a problem of conscience for both the ordinary and the promoter of justice. To persist in the accusation, openly contesting the truth, would

1. Cf. M. LEGA, *Commentarius in iudicia ecclesiastica*, curante V. BARTOCCETTI, III (Rome 1950), p. 277.

constitute a humiliation for the one presumed culpable now that the ordinary has been put into the precise and diametrically opposite position with regard to the respective duties of safeguarding the *bonum publicum*. This coincides with the rediscovered concept of *communio* in its more accredited formulation, in *cuanto valor supremo de la experiencia*,[2] included by the Apostolic Constitution *Sacrae disciplinae leges* as being among the elements characteristic of the true and genuine image of the church.[3]

From a technical viewpoint, the validity of the renunciation of the instance requires the acceptance of the one being charged. Consequently, he must be questioned to verify whether he intends to put forward anything against the renunciation, since he could be desirous of further court action for arriving at the sentence. If he hopes to be found not guilty—either totally or partially—he may not wish to support the renunciation. The only condition is that the one being charged has not been *declared* absent from the trial (c. 1592). This declaration is necessary, since the simple absence in itself is not sufficient, according to what was affirmed by a consultative body and accepted by the consultors.[4]

As for what pertains to the form of the promoter of justice's renunciation, other items are also required for its validity. Not only does it have to be in writing and signed, it must also be accepted by the judge (c. 1524 § 3). However, it will be difficult for the judge to reject any renunciation that is accompanied by mandate or by the consent of the ordinary.

Finally, it is appropriate to remember that the renunciation *(which does not refer to the acts of the case)* can be presented at any stage of the trial. Therefore, it can take place both in the first instance and in the court of appeal, either in the place of the consideration of the complaint of nullity against the sentence, or in the place of the consideration of the petition in order to effect a *restitutio in integrum*.

2. Cf. E. CORECCO, *Valore dell'atto "contra legem,"* in *La norma en el Derecho canónico. Actas del III Congreso Internacional de Derecho canónico*, I (Pamplona 1979), p. 849.

3. Regarding the inclusion of the doctrine of "communio" in the Code, among the most recent contributions are L. GEROSA, *Diritto ecclesiale e pastorale* (Turin 1991), pp. 3f; "Comunione e disciplina ecclesiale," in *Monitor Ecclesiasticus* 116 (1991), p. 3–259; G. SARACENI, "Riflessioni preliminari a una costituzione giuridica della Chiesa in quanto comunione," in R. BERTOLINO (Ed.), *Scienza giuridica e Diritto canonico* (Turin 1991), pp. 189ff.

4. Cf. *Comm.* 12 (1980), p. 194.

1725 **In causae discussione, sive scripto haec fit sive ore, accusatus semper ius habeat ut ipse vel eius advocatus vel procurator postremus scribat vel loquatur.**

In the argumentation of the case, whether done in writing or orally, the accused person or the advocate or procurator of the accused, always has the right to speak last.

SOURCES: SN cann. 553, 570

CROSS REFERENCES: cc. 1486 § 1, 1602 § 1, 1603 § 3, 1604 § 2, 1723, 1728

COMMENTARY

Raffaele Coppola

This canon, which does not have precedents in the *CIC*/1917, establishes a substantial difference with regard to contentious trials. In contentious trials, rejoinder belongs to the promoter of justice and to the defender of the bond (c. 1603 § 3); in penal trials, it is a true and proper right of the accused to have the final word. This is done in a spirit of equity and moderation, both of which have influenced the legislator to reverse the traditional order in the argumentation of the case due to the gravity of the remedy of the penal sanction. The intervention can be made through writing or orally, personally or by means of one's own advocate or procurator.

It was proposed, by a part of some consultative bodies, that the canon be divided (387 of the *Schema*) into two paragraphs: one relating to the right of the accused *in causae discussione scripto facta*, the other to the right of the same person "in the discussion of the case according to the norm of c. 263 paragraph 2" (the present c. 1604 § 2). The suggestion was not accepted by the consultors, who supported the formula that was later received into the *CIC* because of its clarity and its utility in responding to the different types of discussion of the case that the consultors had accepted in cc. 261–264 of the *Schema* (the present cc. 1602–1606).[1]

This choice by the legislator appears coherent with the *unitary design* that controls the relationship between the penal trial and the ordinary trial. The introduction of simple oral elements, such as the implementation of a debate during the hearing at the tribunal in place of

1. Cf. *Comm.* 12 (1980), p. 195.

written defenses and observations, or, if the case *is* accomplished through writing, the addition of a moderate oral debate for the purpose of clearing up some questions (cc. 1602 § 1–1604 § 2), does not in any way contradict the retention of the model of the penal trial, which is not an oral contentious trial (see the commentary on c. 1728).[2]

The same reasoning, despite the different opinion recently formulated in this respect,[3] goes for the *CCEO*. Here, joined with the presence of the more relevant oral elements (cf. *CCEO*, cc. 1476, 1477, 1480), there exists as a backdrop the *explicit* prohibition from applying the canons about the summary contentious trial to the penal trial (*CCEO*, c. 1471 § 1). As in the *CIC*, this prohibition is centered on the *audientia iudicis* and specifies a minimum of writing, since writing is never absolutely excluded in the oral proceedings, even though it retains the fundamental elements of an authentic trial.

Our last observation concerns the right of the accused to have the final say —in speech or writing— through his advocate. This option widens his chance for the exercise of self-defense. Even so (see, for the reasons, the commentary on c. 1723), in the case of dissent with the defending advocate or patron, the one assigned as his patron does not prevail in the operations which require an advanced technical preparation and in the role of defense, as happens today in the administration of the legislations of states.[4] In every case, to preserve the liberty of the accused, it remains his right to revoke the mandate of his patron and to name a new one, if he considers it his best option (c.1486).

2. Cf., regarding that question, the useful and still fundamental monograph of A. NICORA, *Il principio di oralità nel Diritto processuale civile italiano e nel Diritto processuale canonico* (Rome 1977).

3. Cf. G. DI MATTIA, "La normativa di Diritto penale nel Codex Iuris canonici e nel Codex canonum Ecclesiarum orientalium," in R. COPPOLA (Ed.), *Incontro fra canoni d'Oriente e d'Occidente. Atti del Congresso Internazionale*, 2 (Bari 1994), pp. 511–534.

4. Cf. F. CORDERO, *Procedura penale* (Milan 1993), pp. 273–274.

1726 **In quolibet poenalis iudicii gradu et stadio, si evidenter constet delictum non esse a reo patratum, iudex debet id sententia declarare et reum absolvere, etiamsi simul constet actionem criminalem esse extinctam.**

If in any grade or at any stage of a penal trial, it becomes quite evident that the offence has not been committed by the accused, the judge must declare this in a judgement and acquit the accused, even if it is at the same time clear that the period for criminal proceedings has elapsed.

SOURCES: —

CROSS REFERENCES: cc. 1362, 1363, 1608, 1651

COMMENTARY

Raffaele Coppola

This canon brings to our consideration the fascinating problem of the *moral certitude* of the judge (see the commentary on c. 1608). As is well known, one is not treating here *absolute* certitude, attainable with difficulty by men, nor of its exact opposite, the *quasi-certitude,* which is based upon probable elements in a greater or lesser measure, and which is insufficient to justify the difficult decisions of the judge without the "presumptions" or the "preferences of the law". Moral certitude, the way it is extracted from the teaching of the supreme Magisterium of the Church, even where it may allow for the abstract possibility of a different truth, does exclude all well-founded and reasonable doubt and can be attained, originating in the *combination* of the acts with the proofs, as well as clues leading to the resolution of the case.[1]

Now the appropriateness of the theme is made fully intelligible from its adaptation to the penal trial of c. 1608 § 4. According to the sense of the canon, the one charged certainly has to be acquitted when, starting from the acts of the case, the judge has not obtained the required certitude about the objective or the subjective element of the delict. This is according to the ancient rule *actore non probante, reus absolvitur.*

However, this congruity seems less intelligible when referring to the present canon, because there was no place provided for observations during the work of revising the Code.[2] It is clear that the tone of the norm

1. For the most relevant passages in this regard of the discourses to the Rota Romana of PIUS XII (October 1, 1942) and of JOHN PAUL II (February 4, 1980), cf. L. CHIAPPETTA, *Il Codice di Diritto canonico. Commento giuridico-pastorale,* II (Naples 1988), p. 687.

2. Cf. *Comm.* 12 (1980), p. 195.

imposes upon the judge the obligation to have diligence in arriving *ex actis et probatis* at the state of being convinced that the crime was not committed. When this is accompanied with complete certitude from the *critical* consideration of the data he has at his disposal, then, in whatever grade or stage of the trial he acquires such certitude, he must acquit the one accused.

Having gained the moral certitude that the delict was not committed, the acquittal is a fundamental right of the one accused. It is *inviolable*, insofar as it is established, according to the common opinion, for the protection "of the good name of the one indicted, and jeopardized, in a certain way, by the trial itself."[3]

Due to this moral certitude, the acquittal must be given even when it is evident that there is an extinction of criminal actions (c. 1362). The Code speaks correctly of *criminal action*, which is the process of investigation effected to show the existence of the delict and to lead to the imposition of the corresponding penalty. It is the action that is distinguished from being properly *penal* and from being of an executive nature, since it has been directed to carry out the penalty upon the foundation of a sentence already issued but not yet executed (c. 1651).

3. P.V. PINTO (Ed.), *Commento al Codice di Diritto canonico* (Rome 1985), p. 988.

1727 **§ 1. Appellationem proponere potest reus, etiam si sententia ipsum ideo tantum dimiserit, quia poena erat facultativa, vel quia iudex potestate usus est, de qua in cann. 1344 et 1345.**

§ 2. Promotor iustitiae appellare potest quoties censet scandali reparationi vel iustitiae restitutioni satis provisum non esse.

§ 1. The defendant can appeal, even if discharged in the judgement only because the penalty was facultative, or because the judge used the power mentioned in Cann. 1344 and 1345.

§ 2. The promotor of justice can appeal whenever he considers that the reparation of scandal or the restitution of justice has not been sufficiently provided for.

SOURCES: —

CROSS REFERENCES: 1344, 1345, 1628–1644

COMMENTARY

Raffaele Coppola

The precedents of this canon, like the common norms about the appeal, are too general to be considered here in any way.

Without a doubt, the appeal, which is not strictly demanded by the natural law (but it does present similar advantages and is admitted in all legislations), presupposes the existence of an *injury*. It is with regard to that injury, resulting from the dispositive part of the sentence, that the concern arises and is the only thing that justifies the action.[1]

The particular aspects of the penal trial, as far as the appeal is concerned, are centered on the individuation of the two types of injury, namely those that spur the interest to make the appeal: first, in the person indicted and, second, in the promoter of justice.

The one being arraigned can, with complete security, appeal for the purpose of obtaining redress for the injustice suffered in the first instance; this being the failure to rectify the effects of the error of the possible bad faith of the judge, or even of his flippancy or lack of knowledge. However,

1. Cf. R. NAZ (Ed.), *Traité de Droit canonique*, IV (Paris 1954), p. 347.

in the exercise of the discretional powers foreseen by cc. 1344 and 1345, the arraigned can also appeal in the instance of the case where the judge was believed to have acted in his own favor.

Here one is hypothetically treating those situations in which a penalty is deferred or is allowed to be imposed, as well as those situations in which a lighter penalty or —by way of substitution— a penance is put off or imposed. Alternatively, it is applied when the obligation is to observe an expiatory penalty because of the diverse circumstances that demand consideration, such as when they are indicative of a particularly weak will. In these cases, the injury consists in the absence of a full declaration of innocence, which the accused has a right to claim in the instance of appeal with an adequate defense.

The accused can lodge the complaint of nullity or seek the *restitutio in integrum*, in accord with cc. 1619–1627 and 1645–1648, if the required conditions are present—and this in addition to his appeal.

The right of appeal, just like the lodging of the complaint of nullity against the sentence and the *same restitutio in integrum*,[2] equally pertains to the promoter of justice, who has the *duty* of appealing when he considers that the issued sentence has not safeguarded the public welfare (in order to repair the scandal and reestablish justice, according to the literal expression of c. 1727).

In fact, in its facultative sense the expression *promotor ... appellare potest* would have to be corrected in the light of the general principles, which exclude the duty of protection of the "public welfare" where an effective injury has taken place. The promoter of justice cannot then renounce it, since, in contentious cases, it would apply to the private welfare of the parties.[3]

On the other hand, one would not be dealing with a defect in the norm "granted that the practical judgment in such situations is difficult and complex." The legislator would have preferred "simply to leave the way open for the possibility of an appeal, rather than to impose the obligation."[4]

The specific character of this commentary, especially its suitability in directing and helping whoever encounters it outside academia, inclines one toward adapting the second interpretation, even if this opposes the writer's express intention.

2. Cf. *Comm.* 12 (1980), p. 198.

3. Cf. M. LEGA, *Commentarius in iudicia ecclesiastica*, Fr. V. BARTOCCETTI, II (Rome 1950), p. 977.

4. V. DE PAOLIS, "Il processo penale nel nuovo Codice," in *Dilexit iustitiam. Studia in honorem Aurelii Card. Sabattani* (Vatican City 1984), p. 493.

1728 **§ 1. Salvis praescriptis canonum huius tituli, in iudicio poenali applicandi sunt, nisi rei natura obstet, canones de iudiciis in genere et de iudicio contentioso ordinario, servatis specialibus normis de causis quae ad bonum publicum spectant.**

§ 2. Accusatus ad confitendum delictum non tenetur, nec ipsi iusiurandum deferri potest.

§ 1. Without prejudice to the canons of this title, and unless the nature of the case requires otherwise, in a penal trial the judge is to observe the canons concerning judicial procedures in general, those concerning the ordinary contentious process, and the special norms about cases which concern the public good.

§ 2. The accused person is not bound to admit to an offence, nor may an oath be demanded of the accused.

SOURCES: c. 1959

CROSS REFERENCES: cc. 1199 § 1, 1400–1500, 1501–1655

COMMENTARY

Raffaele Coppola

Following the tradition of the *CIC*/1917 (c. 1959), the penal trial does not have an autonomous character: "it lacks its own legislation, that is to say, no specific original legislation was produced for it. Fundamentally it does not have any other legislation or any other doctrine than that of the contentious trial, *adapted* to the criminal."[1]

This brings to mind the similarity of the directive criteria, as well as the similarity in virtue of the transference effected through the § 1 of this canon. According to this canon, *preserving in place the special arrangements* of the canons under this title (see commentaries on cc. 1720–1727), in the penal trial there are to be applied, *nisi rei natura obstet*, the canons about trials in general and the ordinary contentious trial, with particular attention to the norms for cases which have to do with the public welfare. Any reference to the oral or *summary* process is excluded (see commentary on c. 1725) according to the terminology of the *CCEO* and, in cases that concern the public welfare, the judge can and must proceed, even *ex*

1. M. CABREROS DE ANTA, *Estudios canónicos* (Madrid 1956), p. 657.

officio. In cases that affect only the private welfare, the principle of the request of the party applies (c. 1452 § 1).

As has been observed, the penal matter (substantive and procedural law) "is the field where it is better for them to be able to carry out the particulars of canon law."[2] This is a genuine frontier with state legal systems. Here, we shall limit ourselves to mentioning the framework for the basic directive criteria in question. These criteria provide the instrumental function of the trial, the mindful and careful safeguarding of the rights of the community within the context of the accused's rights, and the value of equity, judgment and substance as opposed to any destructive formalism. These are often unimportant in the secular ordinances.

As for the framework, the penal trial is written in separate articles according to the following judicial outline, which follows the steps of the ordinary contentious process: the introduction of the case by means of the written *libellus* of the promoter of justice; the constitution of the one judge or the collegial tribunal, in the cases considered by c. 1425 §§ 1–2 (see commentary on c. 1721); the provision for the one being charged with his formal writ of summons; the *litis contestatio*, with the formulation of the types of allegations; the instruction of the trial (the acquisition of the proofs as expressed by the promoter of justice and by the person being charged, who can also challenge what has been submitted right at the beginning); the publication of the acts of the trial and the conclusion *in causa*; the discussion and the sentence; the possible challenges of the parties in the process; and the execution of the sentence that has passed into a completed judgment.

Canon 1728 concludes by authorizing a dual order of rights (the juridical right and, before everything, the *moral right*) of the accused. He is not obligated to confess his delict, and the judge cannot impose an oath upon him, *id est invocatio Nominis divini in testem veritatis* (c. 1199 § 1).

Some canonists have the opinion that the person being charged has the faculty of taking a spontaneous oath, if not persuaded to do so by the judge.[3] On the other hand, he must not be silenced regarding those things in the cases that affect the public welfare (therefore also in the penalties). Both a judicial confession and the declarations of the parties that do not constitute a confession have the ability to provide probatory force. They must be held in high esteem by the judge, but the judge cannot attribute the force of full proof to them if further elements are not added for his definitive evaluation (cf. c. 1536 § 2)

In this context, the initiative of the one being charged might not have an influence except marginally upon the *iter* decided upon by the judge. Asking for an oath about the crime that has been committed is defined as

2. R. BACCARI, *Elementi di Diritto canonico* (Bari 1984), p. 103.
3. Cf. F. LOZA, commentary on c. 1728, in *CIC Pamplona*; L. CHIAPPETTA, *Il Codice di Diritto canonico. Commento giuridico-pastorale*, II (Naples 1988), p. 780.

tortura moralis seu spiritualis. Such a request is prohibited. It is an acquired right that cannot be renounced. It is a right of such a nature that it cannot admit any alteration due to a person's inclination, not even in the form of a spontaneous oath, which might be offered to win the good will of the judge.

Theologians and jurists share the rule *nemo turpitudinem suam revelare tenetur.*[4] It corresponds to the image of a law put together in accordance with the nature of man,[5] taking into consideration that heroic conduct cannot *normally be demanded*, not even in a system based on values that are significantly religious but which, on the other hand, do not always impose heroism.

4. For a brief and interesting historical perspective on the prohibition of the oath "de veritate dicenda" in criminal cases, cf. M. LEGA, *Commentarius in iudicia ecclesiastica,* V. BARTOCCETTI (Ed.), II (Rome 1950), pp. 611ff.

5. Cf. CORPUS IURIS CIVILIS I *Digesta* (Th. Mommsen-P. Kruger, Berlin 1954), 1. 5. 2. (Hermogenianus Lib. I *iuris epitomarum*).

CAPUT III
De actione ad damna reparanda

CHAPTER III
The Action for Damages

1729 **§ 1. Pars laesa potest actionem contentiosam ad damna reparanda ex delicto sibi illata in ipso poenali iudicio exercere, ad normam can. 1596.**

§ 2. Interventus partis laesae, de quo in § 1, non amplius admittitur, si factus non sit in primo iudicii poenalis gradu.

§ 3. Appellatio in causa de damnis fit ad normam cann. 1628–1640, etiamsi appellatio in poenali iudicio fieri non possit; quod si utraque appellatio, licet a diversis partibus, proponatur, unicum fiat iudicium appellationis, salvo praescripto can. 1730.

§ 1. In accordance with Can. 1596, a party who has suffered harm from an offence can bring a contentious action for damages in the actual penal case itself.

§ 2. The intervention of the harmed party mentioned in § 1 is no longer admitted if the intervention was not made in the first instance of the penal trial.

§ 3. An appeal in a case concerning damages is made in accordance with Cann. 1628–1640, even if an appeal cannot be made in the penal case itself. If, however, there is a double appeal, there is to be only one trial, even though the appeals are made by different persons, without prejudice to the provision of Can. 1730.

SOURCES: —

CROSS REFERENCES: cc. 1414, 1517, 1596, 1639 § 1, 1718 § 4, 1730

COMMENTARY

Gian Paolo Montini

I. INTRODUCTION

To appreciate the extent of the norm collected in the three canons of this chapter III, one must understand that what is being treated here is a chapter that has no parallel in the 1917 Code. We can attribute this introduction to a certain attention to and reordering of the whole matter that "compensation of damages" received in the present Code (cf., especially, c. 128). The present emendations are offered to repair the deficiencies of the preceding Code, both in the substantial and in the procedural area.

Ciprotti had already called attention to these deficiencies and proposed some merger with a view of the re-editing of the Eastern Code.[1] In fact, the first parts of that Code, promulgated by Pope Pius XII by means of his Motu Proprio *Sollicitudinem nostram* (SN), consider observations of this type and, in the procedural section, introduce a chapter very similar to ours.[2]

The present chapter could correctly be thought of as following the suggestions of the same Ciprotti, a *relator* on the Pontifical Commission for the reform of the Code.[3] His textual proposals, aimed at providing norms that would be new *meliusque determinatae*,[4] did not undergo particular modifications in the discussion within the core of the Commission, and the members of the Commission introduced these canons into the practically unchanged definitive draft.[5]

Actually, the new chapter about the process of compensation for damages within the area of a penal judgment brings certain new considerations into this field, although frequently it is limited to the sanctioning of or the confirming of what the general and specific norm of the *CIC*/1917, with its jurisprudence and its doctrine, has already upheld.

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1. Cf. P. CIPROTTI, *Osservazioni sul testo del 'Codex Iuris Canonici'* (Vatican City 1944), pp. 8–9.
2. Cf. *SN*, part. III (*De iudicio criminali*), ch. II (*De ipso iudicio criminali*), Art. III (*De partibus privatis et actione civili ex delicto orta*), cc. 547–554.
3. Cf. *Comm.* 12 (1980), p. 188.
4. Cf. *Comm.* 8 (1976), p. 195.
5. Cf. *Comm.* 2 (1970), pp. 100, 182; 4 (1972), p. 52; 8 (1976), p. 195; 12 (1980), pp. 195–196.

The *CCEO*, in spite of having its own recent tradition at its disposal, has literally incorporated these canons of the *CIC*, although with its proper linguistic peculiarities. These peculiarities are worthy of being noted.[6]

In any case, the explicit regulation of the development of the process for the indemnification of damages in a penal judgment assumes a heightened importance if one considers, on the one hand the particular sensibility that the current canonical arrangement has assumed in the matter of damages. Canon law both follows the present inclination of the civil ordinances and starts from the consideration of the peculiarity of the damages toward the ecclesial communion or in general to ecclesiastical and spiritual goods.[7] On the other hand, there is the wide and analogical force that this chapter contains relative to the analogous cases of connection between the action of damages and the principal action (cf. *PB* 123, about the competence for damages of the Supreme Tribunal of the Apostolic Signatura in administrative justice). An analysis of the contents of the first of these canons follows.

II. ACTION TO MAKE REPARATION FOR DAMAGES

1. *Terminology*

The legislator prefers abandoning the term "civil action" —used in *SN*, in the *CIC*/1917 (cf., for example, c. 2210) and preferred by some canonists. From its common use in this particular context in the civil juridical ordinances (cf., for example, "the constitution of the civil party") "contentious action" seems a term more compatible and logically consistent with the legislation and the former canonical tradition.[8]

The choice of the phrase *in ipso poenali iudicio*, in place of *in ipso poenali processu*, suggests that the unification of the two actions does not take place here in a simply extrinsic form or in a similar procedural structure. Above all, the unification is produced much better at the judiciary and the intrinsic level, taking for granted the intimate connection of the two actions (*see below*).

6. Cf. cc. 1483–1485; Cf. also *Nuntia* 8/14 (1982), p. 97, cc. 361–363; 11/21 (1985), p. 63; 13/24 (1987), cc. 1498–1500.

7. Cf., e.g., R. COPPOLA, "Processo penale canonico," in *Enciclopedia del diritto*, XXXVI (Milan 1987), p. 908.

8. Cf. G. MICHIELS, *De delictis et poenis. Commentarius Libri V Codicis Iuris Canonici I* (Lublin-Brasschaat 1934), pp. 349–352: Scholion. *De identitate terminorum "actio poenalis" et "actio criminalis" ex una parte, "actio civilis" et "actio contentiosa" ex altera.*

The expression *actio contentiosa* is governed by the verb *exercere*, a unique choice in our Code (which habitually uses *instituere*). It reveals the ascent of this norm into the civil ordinances that recognize that expression.[9]

2. *Principle*

The principle enunciated directly by § 1 is broadly accepted and corresponds to the general principles of the Code.

In virtue of c. 1414, "connected cases must be judged by the same tribunal and in the same trial." It is clear that beginning from the same criminal deed, what is requested is the conviction of the defendant and the indemnification for the damages, these being connected cases. Therefore, they deduce that they must be treated by the same tribunal and in the same trial, as the above paragraph anticipates. For that reason, it appears to be like an application of c. 1414.

This § 1, on the other hand, states a *proper principle* only indirectly and implicitly. It is affirmed that "the injured party *can* exercise the contentious action" in the same penal trial, while the general principle would lay down that "the injured party *must* exercise the contentious action in the penal trial." The novelty of this paragraph resides in the fact that it anticipated an exception to c. 1414, or, better yet, it states one of the exceptions to the principle which its own c. 1414 prescribes. This exception is stated in the formula *nisi legis praescriptum obstet*. Canon 1729 § 1 is, therefore, exactly one case in which the connection of cases does not necessarily oblige their being judged in a single process before the one tribunal. More precisely, the connection of the contentious and penal cases is produced only at the insistence of the injured party and before the penal judge.

Paragraph 1 also states a principle of a *secondary* form: the injured party who wishes to instigate the contentious action in the penal trial must do it in accordance with c. 1596. This enunciates the procedural method according to which the contentious action in the penal trial should be carried out: namely, the method of the "intervention of a third party in a case," as regulated by c. 1596. This reference to that category is fully traditional in the canonical system: it can be found in *SN*, 547 § 2 and 551 and among the canonists.[10] This reference implies that the injured party can bring civil action by presenting to the judge something in writing after the citation of the accused and in every circumstance before the conclusion of the case (cf. cc. 1596 § 2 and 1517).

9. Cf. e.g., the Italian *Codice di procedura.*

10. Cf. e.g. M. LEGA, *Commentarius in iudicia ecclesiastica*, III (Rome 1950), pp. 220–221; F. ROBERTI, *De delictis et poenis*, I/1 Rome s.d., n. 218, p. 224.

3. *Reasons*

The reasons for the specific and proper principle stated by § 1 reside in the different peculiarities that exist between the penal action and the contentious action, including when their connection is evident because of their sharing the same criminal deed for their origin. As a matter of fact, the penal action is proposed as public; the promoter of justice introduces it, it leans toward the punishment of the accused and to the restoration of the public order by means of the penal punishment. The contentious action, on the other hand, is private; it is introduced by the injured party, and tends to the indemnification of the damages and to the compensation of a private good by means of the restitution or the compensation for the same injured private interest.

This difference between the two actions can at times have the effect that its procedural connection prejudices the exigencies of each one of the actions more than helping them, and likewise prejudices the parties more than favors them. The injured party can see himself prejudiced by the prolongation and the exaggerated care that are normally necessary in a penal trial; the accused can see himself prejudiced by the fact that the proofs of the penal trial (generally concerning very sensitive material) are wholly put at the disposition of the injured party who seeks the indemnification for the damages.[11] The ecclesiastical community can consider itself wronged by a prolongation of the penal trial, owing to reasons of a private nature (and frequently patrimonial).

However, at the same time, the injured party can see himself favored by the connection of cases insofar as he can directly avail himself of his proofs without the need to await a penal sentence that would be difficult to overturn later on.[12] In addition, he can "save" one process. The community can consider itself favored by the fact that in the gathering of proofs for the penal trial, the injured party contributes. Consequently, the danger of a conflict of sentences —which would result from separately undertaking the contentious process and the penal trial— is obviated.

One understands, therefore, why the legislator —faced with a diversity of serious interests— has preferred in this circumstance to configure the connection as being optional (and conditioned: cf. c. 1730 § 1).

4. *Questions*

a) Paragraph 1 of the canon explicitly indicates the possibility for the injured party to exercise the contentious action in the penal trial. This *implicitly* excludes the possibility of exercising it *before* the establishment

11. Cf. *Comm.* 12 (1980), pp. 195–196.
12. Cf. F. ROBERTI, *De delictis et poenis*, cit., n. 218, p. 244.

of the penal process and even less with the intesntion of asking for its establishment (cf. cc. 1935 § 1 and 1938 § 1, *querela parties laesae*, of the *CIC*/1917): in the penal trial, only the promoter of justice is the petitioner. The obligation of the penal judge to cite the injured party is also excluded (cf., on the other hand, *SN*, 547 § 1). Similarly, there is excluded the connection of processes already established, in the case where the injured party has introduced a contentious case and immediately afterwards the penal trial commences.

In any case, only *by means of the intervention in the penal trial* is the injured party permitted to exercise within it the contentious action. That intervention will mean the renunciation of a civil action that was already introduced and which has not yet been resolved with the passage of the sentence into an adjudicated case (cf. *SN*, 547 § 3). In contrast, the establishment of a contentious process will be equivalent to a refusal to intervene in the penal trial when it might be brought into being (cf. *SN*, 547 § 3). This paragraph indicates that the intervention of the injured party in the penal trial by means of the action for damages is the only means of connection between the contentious case and the penal case. In this context, the terminological option adopted is fully justified: the contentious *action* (that is to say, it is not set up for a trial as yet); the penal *judgment*: (that is to say, the judicial relationship already instituted, from the citation on forward: cf. c. 1587).

b) In the cases in which the contentious action is exercised in a trial separate from the penal (that is to say, when the injured party does not intervene or, having intervened, gives up the project after his or her intervention), the contentious trial must not be suspended in the expectation of the determination of the penal case (cf., on the other hand, *SN*, 548). Both should proceed autonomously, safeguarding the possibility of seeking afterwards, if the circumstances warrant, the *restitutio in integrum* because of the conflict of decisions (cf. c. 1645 § 2, 5°).

c) One cannot conduct the contentious action in the administrative process that the ordinary decides to follow in order to inflict or declare a penalty in the cases in which it is permitted. In that situation the obligation exists with its full force upon the ordinary to consider whether he can settle the contentious question in reference to the damages *ex bono et aequo*, with the consent of the parties. That obligation is established as a question that precedes any decision of the ordinary in respect to the penal procedure (cf. c. 1718 § 4).

d) The competence of the penal judge to conduct a hearing of the action for damages, introduced with the intervention, does not cease if the penal trial fails to come to a sentence. For example, the withdrawal of the accusation on the part of the promoter of justice does not keep the judge

from treating the contentious question about the damages.[13] This is also of use in the case of c. 1730 § 2.

5. *The moment in the proceedings for the intervention of the injured party*

The principle which § 2 sets up is evident. It comes down from the same general principles of the Code that direct the appeal (cf. c. 1639 § 1) and finds agreement from the authors.[14] Therefore, this § 2 is justified as an application of the general principle for a greater certitude, but not solely. Moreover, it declares that the exception to c. 1639 does not apply in this case, having been foreseen by c. 1596 § 1, according to which the intervention of a third party in judgment can be admitted *in qualibet litis instantia.*[15] In addition, this shows the extrinsic and merely procedural character of the reference to the norm concerning the intervention of the third party in judgment in this matter.

6. *Appeal*

When, in the first instance in the penal judgment, there may be a judgment about the damages, the appeal in the case about the damages follows the general norms about appeal, even in the case where an appeal in the penal case cannot be given (cf. also *SN*, 553 § 2). On the other hand, when the appeal takes place for both cases, the judgment made upon the appeal will always be singular, as in the judgment of the first instance.

That means that the intervention of the injured party is influential at any stage and grade of the process, always conserving the right of revocation. The only exception occurs when the judge of the appeal does not consider this joining together appropriate, according to the general criteria of judgment —also valid for the judge of the first instance— expressed in c. 1730.

13. Cf. the corresponding rotal jurisprudence: e.g., c. Wynen, January 5, 1942, n. 2; c. Grazioli, February 21, 1944, no. 2; more in general, cf. G. DI MATTIA, "Il diritto penale canonico nella giurisprudenza della S.R. Rota," in *Ephemerides Iuris Canonici* 16 (1960), pp. 158–202.

14. Cf. M. LEGA, *Commentarius*..., cit., p. 221.

15. Cf. M. LEGA, *Commentarius in iudicia ecclesiastica*, II (Rome 1939), p. 890; art. 160 of the Norms of the Apostolic Tribunal of the Rota Romana.

1730 § 1. Ad nimias poenalis iudicii moras vitandas potest iudex iudicium de damnis differre usque dum sententiam definitivam in iudicio poenali protulerit.

§ 2. Iudex, qui ita egerit, debet, postquam sententiam tulerit in poenali iudicio, de damnis cognoscere, etiamsi iudicium poenale propter propositam impugnationem adhuc pendeat, vel reus absolutus sit propter causam quae non auferat obligationem reparandi damna.

§ 1. To avoid excessive delay in a penal trial, the judge can postpone the trial concerning damages until he has given a definitive judgement in the penal trial.

§ 2. When the judge does this he must, after giving judgement in the penal trial, hear the case concerning damages, even though the penal trial is still pending because of a proposed challenge to it, or even though the accused has been acquitted, when the reason for the acquittal does not take away the obligation to make good the damages.

SOURCES: —

CROSS REFERENCES: cc. 1587–1591, 1629, 4°

COMMENTARY

Gian Paolo Montini

I. POSSIBILITY OF POSTPONING JUDGMENT REGARDING REPARATION (§ 1)

1. *Principle*

The judge can deny the treatment of the contentious case in the penal judgment (petitioned on the part of the injured party in the first instance, which applies also for the appeal). This is permitted only due to the delay that the penal judgment might experience. Logically, there is a desire for the brevity of the penal trial, which is required either on account of the need for a quick punishment of the accused—unless inherent questions about the evaluation or liquidation of damage can be deferred, or on

account of the need for a rapid absolution of the accused, unless relative questions can be deferred (for example, proof of the imputability of the injury).

However, it is perplexing why the legislator has limited the case of denial to the delays of the process since, on the one hand, at times the combination of the trials shortens the process, and, on the other hand, other reasons may exist for keeping the trials separate. In any case, the judge may consider only this reason, which indicates a certain inclination of the legislator in favor of the combination of the two trials, reducing the ability to use discretion on the part of the judge as provided for in c. 2210 § 2 of the *CIC*/1917 and recognizing a right of the injured party to intervene (cf. now in *SN*, 548: *integrum est*).

2. *Questions*

a) After the penal sentence, the judge who forwards the contentious judgment for action denies the intervention in the case of the injured party, but *keeps competence over the contentious judgment*, which the penal judge derives from the connection between the cases, the instance of the party, and the prescription of the canon.

The decision of the judge is quite different if he rejects the intervention of the injured party in the trial because of the absolute limits of competence (cf. c. 1414 and, for example, c. 1405), or through the lack of assumptions (for example, because of the absence of a circumstantial connection between the delict and the damage).

b) In either of the two cases mentioned, the decisions of the judge — adopted in accordance with cc. 1587–1591— cannot be contested insofar as they do not have the force of a definitive sentence (c. 1629,4°; cf. c. 1618). In the first case, the contentious judgment will be handled by the same judge in another instance (cf. c. 1730 § 2). In the second case, the reason is that he might be able to introduce the case for damages before the judge of the contentious trial.

However, the appeal against the rejection of the intervention together with the appeal against the definitive penal sentence (cf. c. 1629, 4°) could be cumulative, absolute or condemnatory. That does not clash with c. 1729 § 2, since that canon prohibits proposing the intervention after the first instance only if it has not been done before in that instance. The text does not say, "if it has not been *admitted*"; therefore, it must be understood "if there has not been *proposed*," anything that existed after the decision of the judge.[1] Nor does it seem to clash with c. 1730 § 2,

1. Cf., in the same sense, M. LEGA, *Commentarius in iudicia ecclesiastica*, III (Rome 1950), p. 221.

insofar as the penal judge must hear the contentious trial after the penal trial only on the assumption of a legitimate rejection of the intervention. Naturally, if the penal judge of the appeal admits the intervention, he will judge regarding the damages in the first instance.

In the matter of the appeal, *SN* explicitly resolved it by distinguishing between an appeal against the decree or the sentence of *admission* of the intervention (cf. *SN*, 552 § 2: the appeal was not given and could be combined with the principal appeal) and the appeal against the decree or sentence of *rejection* of the intervention (cf. *SN*, 552 § 3): *appellatio expeditissime definienda*). This last choice was probably justified by the particular norm in the matter of the relationship between the contentious trial and the penal trial (cf. concerning all *SN*, 548).

In every case, one should hold open the possibility of the same intervention since the judge, if it is his case, may change his opinion (cf. c. 1591).

c) In the 1914 *Schema* of the previous Code, a true and proper obligation of the judge was to resolve both trials at the same time, as long as the *querela damni* would have been introduced before the beginning of the penal case (cf. c. 449). Otherwise, the *querela damni* would not differ from the contentious trials about damages (cf. c. 448 § 1)

II. THE PROROGATION OF COMPETENCE THROUGH THE CONNECTION OF CASES (§ 2)

1. *Principle*

From § 2 emerges the principle according to which, once the instance of intervention is presented in the penal trial, there comes into force the rule of the connection of cases about the *extension of competence*. In fact, even when the judge decides not to accept the intervention of the injured party in the penal trial, he does not lose competence; he will be the same one who judges in the contentious trial once the penal trial has ended.

This sequence of trials is not undermined either by virtue of the appeal which could have been interposed against the penal sentence and is still pending, or for some other reason which does not affect the conditions of the obligation to respond concerning the damages (cf., for example, the absolution of the accused by prescription of the criminal action, c. 1362; or through the termination of the penalty owing to a change of penal law, c. 1313).

2. *Questions*

a) It is not necessary that the judge arrive at an absolute sentence to maintain his competence for the contentious trial about the damages. As a matter of fact, it suffices that the penal trial would have been introduced and the intervention had been introduced, although afterwards there was never a resolution of the sentence (because of the instance having been deserted, the death of the defendant, the withdrawal of the complaint of the promoter of justice, the decision of the ordinary: cf. c. 1718 § 2, etc.).

b) It seems that the sequence of the two trials would preclude, in virtue of the penal sentence which it defines, either the non-existence of the object itself for the accusation, or the non-existence of any moral imputability (cf. *SN*, 549), or that in another way he may pronounce about the non-subsistence of any other condition necessary so that there would arise the obligation for the reparation of the damages.

That arrangement establishes a justifiable exception to c. 1731. In fact, the treatment is made solely to prohibit the same judge from conducting a hearing about the damages after having absolved the accused for reasons that lead also to the negation of juridical responsibility: it could be found as provided for in this second trial. On the contrary, there is no prohibition on the part of the injured party against approaching the judge for the contentious trial.

1731 Sententia lata in poenali iudicio, etiamsi in rem iudicatam transierit, nullo modo ius facit erga partem laesam, nisi haec intervenerit ad normam can. 1729.

A judgement given in a penal trial, even though it has become an adjudged matter, in no way creates a right for a party who has suffered harm, unless this party has intervened in accordance with Can. 1729.

SOURCES: —

CROSS REFERENCES: cc. 16 § 3, 1642 § 2

COMMENTARY

Gian Paolo Montini

1. *Principio*

The principle declared in this canon is non-disputed and issues from the general principle about the adjudicated case: this creates the *ius inter partes* (c. 1642 § 2; cf. also c. 16 § 3) and cannot be related to persons distinct from those implicated as parties in the trial. Actually, what is illustrated here is something recently acquired by the Italian juridical ordinance[1] which before had provided for the prejudiciality of the penal trial over the civil, with no consideration for the intervention in the trial by the injured party.[2]

Therefore, if, in the penal trial, the parties are, on the one hand, the accused and, on the other, the promoter of justice, it will not be possible to give a *res iudicata* with respect to the injured party, at least so that it would partly be conducted with his intervention in the trial. The penal *res iudicatam* where the injured party has intervened has a preventive value against different aspects of the following contentious trial or its being in process, like those indicated indirectly through c.1730 § 2 (cf. also *SN*, 549). The result, apart from that preventive value and because of the general principles about the adjudicated case, is this: in the contentious process one will be able to oppose the *exceptio rei iudicatae* about everything that has to do with the obligation of making compensation both with

1. Cf. arts. 651–652 of the new *Codice di procedura penale* of 1988, anticipated by some sentences of the *Corte Costituzionale* of the 1970's.

2. Cf. regarding this problem, A. PENNISI, *L'accessorietà dell'azione civile nel processo penale* (Milan 1981); F. MENCARELLI, *Parte civile*, in *Enciclopedia giuridica*, XXII (Rome 1990).

what has already been the object of the sentence and also of the sentence in the penal process.

On the other hand, the penal *res iudicata* does not have any preclusive force upon a possible contentious trial instigated by the injured party, if that party has not been intervening actually in the penal trial. Such a disposition (innovative: cf. *SN*, 549) will easily lead to contrasts between decisions which will have to be resolved based on *restitutio in integrum* (cf. c. 1645 § 2, 5°), but it more efficaciously protects the right of the injured party.

Moreover, if the judge makes a judgment about the damages in the penal trial without the injured party having intervened, we would be confronting a null sentence because of the natural law, since it would be classified as *ultra petita*.[3]

2. *Conclusion*

If the canonical norm is compared in this procedural field with its parallel in the juridical civil ordinances and with the preceding canonical norm, it appears to be following a *via media*. On the one hand, the instance is partly privileged as a fundamental element for the connection of the contentious and of the penal cases. This happens in such a way that it amply permits the establishment of subsistent civil actions *a se*, with a certain risk of contradiction in the decisions and with little procedural economy. However, in compensation, it comes with a possibility of a full and complete defense for the injured party. On the other hand, once the penal judge has included, at the insistence of the party, the contentious action in the penal trial, the matter is regulated in a form that is hardly incidental. Rather, they are cases *aeque principaliter* with respect to the penal action.

3. Cf. A. STANKIEWICZ, "De nullitate sententiae 'ultra petita' prolatae," in *Periodica* 70 (1981), pp. 221–235.

PARS V

De ratione procedendi in recursibus administrativis atque in parochis amovendis vel transferendis

SECTIO I

De recursu adversus decreta administrativa

PART V

The Manner of Procedure in Administrative Recourse and in the Removal or Transfer of Parish Priests

SECTION I

Recourse Against Administrative Decrees

INTRODUCTION

Jorge Miras

One of the motivations behind the reform of the *CIC*/1917 referred to the exercise of power on the part of the ecclesiastical administration and the relationship between the acts of authority and the rights of the faithful. Even though they are well known and constitute a lengthy citation, a quote is nonetheless appropriate: "It does not suffice to say that in our current law there is a suitable way to protect rights. As a matter of fact, true and proper subjective rights have to be recognized, without which the juridical ordinance of a society can be conceived only with difficulty. Therefore, it is advisable to send out the message that the principle of juridical protection is applied in canon law to superiors and to subjects in such a way that any suspicion of arbitrariness in the ecclesiastical administration is removed. This object can solely be attained through the appeals that are wisely scattered throughout the law, so that if anybody considers his right damaged by the lower instance court, that right can be efficaciously restored in the superior instance court. While it is considered that the recourses and judicial appeals are sufficiently regulated in the Code (*CIC*/1917) according to the needs of justice, the common

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opinion of canonists believes that, in ecclesiastical practice and in the administration of justice, the administrative recourses are quite conspicuous by their absence ..."[1]

The "recourse against administrative decrees" to which the title of this section alludes, is the only one that sees fit to include it rightfully in the generic category of "administrative recourse." It utilizes the opening lines of Part V, and its proper name is "hierarchical recourse" (cf. cc. 1734 § 3, 2°, 1736 § 1). Actually, the Code does not regulate administrative recourses *per se* against the individual acts of the administration any more than this, because the foregoing *supplicatio* (see commentary on c. 1734) is not properly a recourse, and the administrative dispute (cf. cc. 1400 § 2, 1445 § 2 and *PB* 123) is not an administrative but a jurisdictional recourse. This means that it is a true trial before a judicial tribunal concerning an administrative act.

Although the title of part V announces that it will treat the procedure in administrative recourses, what is mainly regulated are the steps necessary for lodging recourse. In contrast, part V treats the true *procedure* (the itinerary for the substantiation and the resolution of the hierarchical recourse) quite sparingly. Of the eight canons which constitute the first section, the first (c. 1732) is dedicated to defining the extent of the application of those norms; the two following canons regulate the intent of conciliation (c. 1733) and the preliminary petition of revocation or emendation, which is imposed as a requirement for access to the recourse (c. 1734). For its part, c. 1736 regulates a question parallel to the recourse, the possibility of suspending the execution of the administrative act (cf. c. 1737 § 3).

In three of the four remaining canons, norms are contained that refer properly to the procedure of the recourse. However, they regulate only some aspects: the calculation of the time periods for the lodging of the recourse (cc. 1735 and 1737 § 2); the legitimacy needed to make recourse (cc. 1737 § 1); the right of the one making recourse to be represented by an advocate or procurator, and the naming of a patron or advocate on the part of the superior, if he considers it necessary and the one making recourse has not done so (c. 1738). The advisability of avoiding useless delays (c. 1738) is mentioned, as well as the possibility that the superior may order the one making recourse to appear in person (c. 1738). After this, the Code passes directly to enumerate, in the last canon of the section (c. 1739), the different possibilities that pertain to the superior in the final decision about the recourse.

The Code's regulation of the procedure stops at the same moment in which the recourse has been presented. This is done without knowledge of whether it has been admitted or not. From that point, it takes us directly to the moment of the final decision. Therefore, the gap covers all of

1. *Principles,* n. 7. in *Comm.* 1 (1969), p. 83.

the substantive elements of the recourse, from the formality of its being accepted to the drafting of the definitive decree, leaving out the activity of the parties, the means of proof, etc.

The norms that can be applied to partially offset that gap are primarily cc. 35–47, which contain general norms about administrative acts. In addition, there are some canons that are applicable to administrative decrees in general, every time tthe resolution of a hierarchical recourse is produced by means of an individual decree. In particular, the following would be applicable in the procedure for hierarchical recourse:

— Canon 50. From this canon, it is deduced that the superior who resolves the recourse must ask for the necessary information and proofs, and must always listen, as much as is possible, to the interested parties (see commentary on c. 50). There are no more norms about the proof and the hearings with the interested parties in such manner that they can at least provide direction, *servatis servandis*, (cf. c. 19), for the use of the norms about these matters in the judicial procedure (cc. 1476–1490, 1526–1586, etc.).

— Canon 51. This stipulates that the decree for the resolution of the recourse be issued in writing and explain the reasons for the decision (see commentary on c. 51);

— Canon 57. This canon establishes the time limit of three months for the resolution of the recourse and the possibility of its passing into the administrative-contentious procedure if the time period is exceeded without a resolution. Moreover, in virtue of § 3 of this canon, it follows that, for administrative appeals, the norm of c. 128 is applicable, for the purpose of eventually obtaining indemnification for damages on the part of the ecclesiastical administration (see commentary on c. 57).

In articles 134–138, the *Regolamento generale della Curia Romana* regulates the "procedure for the examination of recourses" when the competent hierarchical superior is a dicastery of the Roman Curia. These articles expressly or implicitly declare the points contained in the above canons as being applicable to that procedure.

These few notes are sufficient as a presentation about the regulation of administrative recourse in the Code.[2] The commentary of the canons of this section will provide a basis for a more detailed study of the substantive aspects of the recourse.

2. One can profit from consulting, *La giustizia amministrativa nella Chiesa* (Vatican City 1991). The study of J. Salerno, *Il giudizio presso la "Sectio Altera" del S.T. della Segnatura Apostolica*, ibid., pp. 125–178 offers in note 4 an ample bibliographic sketch on administrative justice.

1732 **Quae in canonibus huius sectionis de decretis statuuntur, eadem applicanda sunt ad omnes administrativos actus singulares, qui in foro externo extra iudicium dantur, iis exceptis, qui ab ipso Romano Pontifice vel ab ipso Concilio Oecumenico ferantur.**

Whatever is laid down in the canons of this section concerning decrees is also to be applied to all singular administrative acts given in the external forum outside a judicial trial, except for those given by the Roman Pontiff himself or by an Ecumenical Council.

SOURCES: —

CROSS REFERENCES: cc. 35–93, 130, 333 § 3, 336–338, 1372, 1405 § 2, 1417, 1445 § 2

COMMENTARY

Jorge Miras

1. *Delimitation of acts as objects of hierarchical recourse*

This norm, which serves as the gateway into the treatment of hierarchical recourse (cc. 1734 and 1736 call it that, appropriately), indicates the acts that can be the object of that juridical remedy, exactly stating the literal expression of the subheading of this section and of the canons themselves, which speak only about particular decrees. In virtue of this canon, the applicability of all the arrangements of the section is extended to the rest of the particular administrative acts (see commentary on c. 35: n. 2). The general norms of administration are excluded only *a priori*. Therefore, hierarchic recourse can be taken against decrees and particular precepts —which are nothing more than a type of decree: cf. c. 49— and also against rescripts, whatever their content may be, and against those acts equivalent to rescripts insofar as they relate to the juridical system (for permissions and favors granted orally: c. 59 § 2).

Certainly, the acts that are the object of the recourse will normally be decrees,[1] because of their proper nature and because of the classification of their contents (cf. cc. 48–49). In contrast, it could seem more difficult to justify the situation where the person who receives a rescript

1. Cf. Z. GROCHOLEWSKI, "Atti e ricorsi amministrativi," in *Il nuovo codice di diritto canonico. Novità, motivazione e significato* (Rome 1983), p. 500.

rejecting a favor could personally suffer because of this. This injury would justify the intervention of a hierarchical recourse, given the character of a favor —not as though owed out of justice— in the *natural* subject matter of rescripts (cf. c. 59). In addition, the interested party may always insist upon making a petition or bringing it before another authority. This has already been provided for by the law with a series of conditions: cf. cc. 64–65 (in that context, the old doctrine and the one following the *CIC*/1917 used to speak of *recourse*,[2] but not exactly in the technical sense that the concept of hierarchical recourse has today). On the other hand, if the contents of a rescript were harmful to the interested party himself —think, for example, although not exclusively, of the premise of c. 61— one must consider that, in principle, nobody is obligated to use the rescript conceded solely in his favor —except due to another title distinct from the rescript itself (cf. c. 71). Moreover, in the case of the privilege, its renunciation is included in accordance with c. 80. Therefore, it could give the impression that the position of the recipient of a rescript is sufficiently protected by the law without a need for hierarchical recourse.

However, the legislator expressly wanted to assure the possibility of placing hierarchical recourse against rescripts because the concession of privileges, dispensations or other favors might cause other injuries or liabilities, not only for the interested party but also for third parties (the Code admits possibilities of that kind: cf. cc. 36 § 1, 38, 82; also cc. 83 § 2, 84). These parties would be left helpless because of their not being equipped with a clear way of defense of their rights and with their juridical circumstances affected by the concession made to the beneficiary.

2. *Limits to the extension of these norms*

a) *Administrative acts given for the internal forum*

The application of these norms does not extend identically to *all* administrative acts because of two restrictions, each of which is derived for a separate reason. The first restriction is pointed out in the canon through the incidental clause *qui in foro externo extra iudicium dantur*. It would not be superfluous to note that this incidental clause contains two points of distinct importance:

— *Qui... extra iudicium dantur*. This instruction does not try to limit a specific category of administrative acts, distinct from the others, but it does express *a common note* for all particular administrative acts (see the introduction for title IV of book I), since every administrative act, by definition, is *extrajudicial*: it takes place outside of a sentence;

2. Cf., for example, F.X. WERNZ-P. VIDAL, *Ius Canonicum*, I (Rome 1938), nos. 261ff; A. VAN HOVE, *De rescriptis* (*Commentarium Lovaniense in C.I.C.*, I/4) (Mechelen-Rome 1936), pp. 152ff.

— *qui in foro externo... dantur.* In contrast, this expression does have a distinct intention and purpose. It states that the scope of the recourse extends only to the administrative acts made through the external forum. To understand the sense of this limitation of the hierarchical recourse, one should keep in mind the proper and individual nature of the circumstances, relationships, and juridical benefits that are the object of regulation through the canonical ordinance. These considerations occasionally warrant that, without always losing their juridical character, the effects need not possess a special external and public importance.

Canon 37, agreeing with the general precaution contained in c. 130 for the exercise of the power of governance, implicitly admits the possibility that, among the particular administrative acts, there would be some that have efficacy only in the internal forum (see commentary on c. 37). There are found among them those that form a part of the competencies of the Sacred Penitentiary, in the internal forum: "absolutions, commutations, sanations, remissions and other favors for the internal forum" (cf. *PB* 117–118; c. 64). As has been correctly pointed out, all of them "are cases of considerable subjective importance, but with scant social consequence."[3] When one is specifically dealing with the juridical acts that combine in themselves the other essential characteristics, in actuality they are particular administrative acts. However, they take place within a special juridical system that requires, besides other features, that they cannot be the object of the recourse as regulated in cc. 1732–1739. Nevertheless, one should not forget that one is treating exceptional situations for the exercise of the power of governing (cf. c. 130), the normal scope of which is the external forum. At the same time, hierarchical recourse constitutes the *ordinary and general way* of challenging particular administrative acts.

Apart from that, the subject matter of this canon is not to establish that the acts that have been exempted —acts for the internal forum and for general norms— are not susceptible of any juridical remedy, but simply to state that hierarchical recourse is not that remedy.

b) *Exclusion of the acts of the Roman Pontiff and of the Ecumenical Council*

The second limitation for the applicability of the norms about hierarchical recourse refers to the particular administrative acts coming from the supreme authority of the Church. In this case, one finds the express formulation of the general principle contained in cc. 333 § 3 and 336–338, and safeguarded through penalties by c. 1372. Strictly speaking, there is no place to intervene with recourse against the acts of the supreme authority of the Church. The same thing can be said about the acts of the Roman

3. E. LABANDEIRA, *Tratado de Derecho Administrativo Canónico*, 2nd ed. (Pamplona 1993), p. 296.

dicasteries approved by the Roman Pontiff in specific form.[4] In those cases, at the most, there will be a provision for directing oneself to the Roman Pontiff by means of a request by way of a favor, according to the ancient institution of the *aperitio oris*,[5] by means of which the Pope can draw up an order to a lower authority so that it might revise one of its own acts, or one that was confirmed in a specific form by him (cf. c. 1405 § 2).

c) *Administrative acts of Roman dicasteries*

Although the canon does not expressly advert to this, the other administrative acts issued or approved by the dicasteries of the Holy See cannot be the object of hierarchical recourse, even though they are not equipped with the approbation of the Pope in specific form. The reason is that *they have exhausted the ordinary administrative way*. The result of this means that, in contesting them, there can only be provided, in an administrative way, a chance of *recovery* before one's own dicastery, as regulated in the *Regolamento generale della Curia Romana*, article 134. This regulation accepts the classic institution of the *beneficium novae audientiae*.[6] Otherwise, there is an extraordinary recourse —that is to say, outside of the ordinary system of hierarchical recourses— to the Roman Pontiff.[7] Generally, however, when one has exhausted the administrative route, the challenge of these acts —not specifically approved— is already produced in the jurisdictional method by means of the "contentious administrative recourse" before the *sectio altera* of the Apostolic Signatura (cf. cc. 1445 § 2; *PB* 123).

4. Cf. RGCR, 126–134; as to the doctrine, cf. V. GÓMEZ-IGLESIAS, "La 'aprobación específica' en la 'Pastor Bonus' y la seguridad jurídica," in *Fidelium Iura* 3 (1993), pp. 361–423.

5. Cf. *X* II, 30, 1–2; D.G. OESTERLE, "Aperitio oris," in *Revista Española de Derecho Canónico* 8 (1953), pp. 25ff; E. LABANDEIRA, *Tratado*..., cit., pp. 263–265.

6. Cf. E. LABANDEIRA, *Tratado*..., cit., pp. 457–459.

7. Cf. c. 1417: regarding how it applies in this context, cf. E. LABANDEIRA, ibid., pp. 450–454.

1733 § 1. **Valde optandum est ut, quoties quis gravatum se decreto putet, vitetur inter ipsum et decreti auctorem contentio atque inter eos de aequa solutione quaerenda communi consilio curetur, gravibus quoque personis ad mediationem et studium forte adhibitis, ita ut per idoneam viam controversia praecaveatur vel dirimatur.**

§ 2. **Episcoporum conferentia statuere potest ut in unaquaque dioecesi officium quoddam vel consilium stabiliter constituatur, cui, secundum normas ab ipsa conferentia statuendas, munus sit aequas solutiones quaerere et suggerere; quod si conferentia id non iusserit, potest Episcopus eiusmodi consilium vel officium constituere.**

§ 3. **Officium vel consilium, de quo in § 2, tunc praecipue operam navet, cum revocatio decreti petita est ad normam can. 1734, neque termini ad recurrendum sunt elapsi; quod si adversus decretum recursus propositus sit, ipse Superior, qui de recursu videt, recurrentem et decreti auctorem hortetur, quotiescumque spem boni exitus perspicit, ad eiusmodi solutiones quaerendas.**

§ 1. Whenever a person believes that he or she has been injured by a decree, it is greatly to be desired that contention between that person and the author of the decree be avoided, and that care be taken to reach an equitable solution by mutual consultation, possibly using the assistance of serious-minded persons to mediate and study the matter. In this way, the controversy may by some suitable method be avoided or brought to an end.

§ 2. The Bishops' Conference can prescribe that in each diocese there be established a permanent office or council which would have the duty, in accordance with the norms laid down by the Conference, of seeking and suggesting equitable solutions. Even if the Conference has not demanded this, the Bishop may establish such an office or council.

§ 3. The office or council mentioned in § 2 is to be diligent in its work principally when the revocation of a decree is sought in accordance with Can. 1734 and the time-limit for recourse has not elapsed. If recourse is proposed against a decree, the Superior who would have to decide the recourse is to encourage both the person having the recourse and the author of the decree to seek this type of solution, whenever the prospect of a satisfactory outcome is discerned.

SOURCES: —

CROSS REFERENCES: cc. 50, 57, 209, 221 § 1, 223, 1446, 1713–1716, 1734, 1735, 1737 § 2

COMMENTARY

Jorge Miras

The Code establishes two steps before intervening with hierarchical recourse: the intent, regulated in this canon,[1] of reaching a solution of mutual accord to avoid the recourse, and the *supplicatio* to the author of the administrative act being challenged (see commentary on cc. 1734–1736).

1. *Suitability of avoiding unnecessary litigations*

In the context of the canonical regulation of processes in general, and as an elementary feature of the Christian physiognomy that must portray the coexistence of all the faithful in the church, the duty to reject the litigious spirit is promulgated (cf., for example, Titus 3:1–2; 1 Tim 3:3; 2 Tim 2:23–24; etc.). It must find its substitute in a benign and gentle spirit (cf. 1 Cor 13:4–7), which diligently seeks the manner "with due regard for justice, of ensuring that lawsuits among the people of God are avoided as far as possible, and are settled promptly and without rancour" (c. 1446 § 1).

Paragraph 1 of this canon conveys that same spirit toward the area of administrative recourses, expressing in a compelling way (*valde optandum est*) the desire to try to avoid them, or, though various methods of recourse, to resolve the conflict which might arise between the ecclesiastical authority and the faithful subject to that authority as a consequence of an act of power issued in the exercise of the administrative function.

Obviously, the purpose of the norm is to exhort that, by means of a suitable way, a controversy should be either prevented or terminated. This does not implicitly declare that hierarchical recourse is an unsuitable means to resolve disputed questions juridically. As a juridical remedy, there can be no doubt that it does settle them, but it does so by means of an act of power, which *imposes the solution upon the parties in an authoritarian manner.* The worry revealed through this canon is due to the fact that, rather than using that course of action, though it might be perfectly adequate and legitimate to resolve possible controversies, its purpose is not to *avoid* conflicts or to resolve them *through mutual*

1. Regarding the antecedents of these norms, cf. J. CORSO, "I modi di evitare il giudizio amministrativo," in *La giustizia amministrativa nella Chiesa* (Vatican City 1991), pp. 33ff.

agreement. In that sense, there is no room to doubt that, whenever possible, a peaceful and agreeable solution is preferred over any other, which, in addition to prolonging the situation of conflict while the recourse is resolved (with its further possible appeals), will turn out more traumatic in relation to the final decision (it will not satisfy at least one party, and, on occasion, will fully appease neither). In addition, it might expose the parties in conflict —through deficiencies not attributable to the law, but to the condition of human nature— to inflicting injury upon the communion of the faithful, at least affectively, making it more expensive to mend the possible impairment of the desirable relationships of mutual trust and collaboration, once the lawsuit has been concluded.

However, all this must be accomplished insofar as it is possible without detriment to justice (cf. c. 1446 § 1) or injury to the welfare of the Church. The call of this norm to the spirit of harmony, of dialogue and cooperation, is not an exhortation toward the systematic renunciation of rights or the neglect of obligations, in such a way that conflicts are avoided *at every cost.* The canonical legislator knows[2] that a hypothetical *harmony* based upon unjust situations, or in some way injurious to the life of the Church, would not be true peace but, at most, a shallow appearance of the absence of conflicts, which has very little to do with fellowship: "peace will be the work of justice" (Is 32:17), in the way that, when it is necessary to carry out these lawsuits, make these appeals, and in general to employ the means arranged for the protection of rights, these all function as suitable and efficacious means for the service of the fellowship.[3] One must not forget that this norm is found exactly in the context of the canonical regulation of hierarchical recourse, which is not viewed as contradictory, but as complementary to the fundamental right of the faithful recognized in c. 221 § 1. This canon, in its turn, must be interpreted in harmony with cc. 209 and 223 (see commentaries on the three cited canons).

Overall, the relationships between the ecclesiastical authority and the faithful subject to it, in the context of the administrative function, can be expressed in the classic structure of the relationships between the public welfare and the individual good. In its search for the public good, entrusted to the *diakonía* of the public authority of the Church, it sometimes inevitably happens that personal or particular interests must be sacrificed to the cause of the higher good. These take place when there is no other way to assure the public welfare, and one cannot legitimately sacrifice authority upon the altars of badly understood reconciliation. However, on other occasions, the injury of the particular good caused by the act of authority can be contrary to the law, and then the member of the faithful

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2. Cf., in this regard, *Principles*, 1, 6 and 7.

3. Cf., for a more ample development of this question, among others, J. LLOBELL, "Il 'petitum' e la 'causa petendi' nel contenzioso-amministrativo canonico. Profili sostanziali ricostruttivi alla luce della Cost. Ap. 'Pastor bonus,'" in *La giustizia amministrativa...* cit., especially pp. 101–107.

who is affected does not have any obligation to endure it. Or, it can happen that, even when the act is legitimate, the sacrifice imposed is unnecessary or disproportionate, or the means adopted is inopportune, or it responds to a reckless decision that could be reconsidered with more caution to make it less burdensome (see commentary on c. 1739). In all of those cases, the faithful person who is affected has the right to appeal, a right whose correct exercise never implies an undermining of the communal fellowship.

It is in these situations of conflict that this norm is applied. Thus, it is not directed solely to whoever is considered prejudiced through the administrative act, but also to the authority from which the administrative act was issued. Canon 1446 (discussed above), in a different manner, treats the general principle from which the present canon emerged. It draws attention "to all the faithful and first of all to the bishops" as being subject to the duty of avoiding unnecessary conflicts. In fact, in the matter of administrative relationships, a most important role in the avoidance of conflict belongs to the authority, by means of their special preoccupation for the correct and adequate performance of service in exercising ecclesiastical power. In this context, as has been skillfully pointed out,[4] there should be an interest in rendering the hearing effective and operative before issuing an administrative act; this helps avoid future conflicts. Then, there is also the procedural norm that ensures that the Code, without imposing it as a requirement for the validity of the acts (see commentary on c. 50), relies upon the sensibility of the ecclesiastical authority and its prudent evaluation of the circumstances.

2. *Means of seeking conciliation*

a) *Through the mediation of persons not integrated into a stable organism of conciliation*

Undoubtedly, the most direct measure of searching for conciliation is the immediate dialogue between the authority and the person affected by the administrative act. However, it will not always be possible, prudent, or productive. Therefore, the canon (§ 1) has additionally provided the possibility of approaching some persons to study the subject and intervene between the parties, managing to make that dialogue possible, and perhaps efficacious. Insofar as the personal conditions of the mediators, the norm indicates only that they have to be *serious persons*. The circumstances of each case will determine the qualities that the suitable mediators have to fulfill. They are advised to be capable persons who enjoy the confidence of the person affected, or have an easy access to the parties in

4. Cf. P. MONETA, "La tutela dei diritti dei fedeli di fronte all'autorità amministrativa," in *Fidelium Iura* 3 (1993), especially pp. 291ff.

conflict, or perhaps are equipped with other kinds of qualities —a certain prestige, certain technical or professional aptitudes, etc.— in addition to prudence. In any case, the intention of the norm does not seem to be that one always must deal with the same person, since this would lead to the detriment of the desired effectiveness.

b) *Stable organisms of conciliation*

On the other hand, the provisional institutionalization of competencies of this type is considered in § 2, which anticipates the possibility that the bishops' conference might stipulate that in each diocese there be set up a stable organization, according to the norms generated through their own conference. In the absence of a decision from the bishops' conference, the bishop can institute that department or council in his diocese.

According to some opinions, the establishment of these organizations would perhaps have had results that are more favorable outside of the diocese, in a way that would exercise its functions with a greater independence with respect to the diocesan authority. This independence could bring about an improvement in the prospects of interventional success.[5] In any case, it does not appear that in the view of the foreseen conduct (which does not in any way possess a decisive character) the question is of great practical importance.

The features of this department or council of conciliation, such as appear to be sketched in the text, are the following:

— It has to have a stable character; it is not established provisionally for every case;

— It possesses a function that is exclusively advisory, which is made evident in the search for fair solutions —therefore, they are not necessarily solutions from strict justice, which is the proper duty of the administrative tribunal. The administrative tribunal later on *will suggest* these fair solutions to the parties, since they have to accept them and submit to them by mutual accord.

No norm is established about the composition of that "department," nor about the character, merits and conditions of the members, since it leaves all of that to the norms established by the bishops' conference or, in its absence, by the bishop who might institute this council in his diocese.[6]

5. Cf. L. DE ECHEVERRÍA, commentary on c. 1733, in *CIC Salamanca*.

6. Cf., for some suggestions regarding the assignation of this institutionalized function to other already existing organs, L. DE ECHEVERRÍA, commentary on c. 1733, cit. One can find references to some already constituted organs of conciliation for other categories of conflicts, in P. MONETA, "La tutela...," cit., p. 296, note 15; S. BERLINGÒ, "Il diritto al 'processo' (c. 22 §2 CIC) in alcune procedure particolari," in *Fidelium Iura* 3 (1993), pp. 342–343; for some projects and their results cf. Z. GROCHOLEWSKI, "I tribunali regionali amministrativi nella Chiesa," in *La giustizia amministrativa nella Chiesa* (Rome 1984), pp. 135–165.

3. *Applicability of the solutions contemplated in cc. 1713–1716*

The Code, in cc. 1731–1716, controls the settlement and the commitment to arbitration as the means for an extrajudicial solution of controversies. Are these applications also ways toward the solution of the conflicts caused through an administrative act?

To answer to this question, one must start from the fact that every activity carried out in the exercise of the administrative function is aimed at the good of the public welfare, and the same can be said of the individual administrative acts. Consequently, the prohibition of c. 1715 § 1, according to which "settlements and mutual promises to abide by an arbitrator's award cannot validly be employed in matters which pertain to the public good, and in other matters in which the parties are not free to make such arrangements," would seem to absolutely exclude settlement as a means of solution for administrative conflicts.[7]

However, if one carefully considers the subject matter, there could be a more harmonious answer. Certainly, a settlement about the public welfare is not admissible in the case where it is being dealt with, since the public welfare is not *negotiable* and is not at the disposition of the authority. However, it is one thing to seek the public welfare with an administrative act, and it is something very different to affirm that the decision contained in that act might be the only way possible *hic et nunc* to make a ruling for that determined facet of the public welfare. Alternatively, it might be that all and each one of the concrete aspects of the administrative act are identifiable directly and essentially with the public welfare. It should be observed that c. 1715 § 1 does not exactly prohibit the settlement in the *cases* in which the public welfare enters, but *circa ea quae ad bonum publicum pertinent*: it does not treat of a generic exclusion of how far its jurisdiction extends, but to the specific exclusion of the objects of the settlement. It is evident that the authority might consider its act again and modify it after taking into consideration the requests of the person affected, either to mend it insofar as there exist other ways of accomplishing the same finality which is aimed at, or more carefully to evaluate the possible lack of proportion between the good that is pursued and the sacrifices demanded, etc.

Therefore, it seems possible to state that the settlement in these hypotheses might also be possible, since it does not automatically assume a surrender of the obligation of the authority toward the public welfare. This would not occur every time that this settlement examined the possible solutions that arise in the dialogue and made sure they were not insidious to the public welfare before accepting them, or even reaching a decision about them.[8] A highly subtle example of a possible accord about

7. Those who exclude it by referring to the transaction in its strictest sense are e.g., L. DE ECHEVERRÍA, commentary on c. 1733, cit.; J. CORSO, "I modi di evitare...," cit., p. 51.

materials related to the public welfare is found in c. 1743. For this proposal, one can also recall what the *CCEO* cites —with a drafting parallel to the first one that was proposed for § 1 of the present c. 1733 of the *CIC*[9]— namely that, among other possible solutions of the controversy, and in addition to being joined to the voluntary amendment of the decree, a just compensation for the person affected (cf. *CCEO*, c. 999), which evidently might be the object of compromise between the authority and the proper person affected. In another way, if the authority might not be able to yield and compromise in anything that is related with regard to its administrative act, it is hard to understand how the authority might arrive at solutions "of common accord," according to this canon.

However, because of some people's difficulty in accepting the settlement in this environment, it should be clarified that the expression "solutions of common accord" certainly does not mean that the result of the intention prior to the conciliation is an administrative act by nature in a certain way "contractual," or of a bilateral character. Such an administrative act would be contradictory to the proper nature of the act of authority, which is always unilateral. In addition, it would go against the inalienable right and duty of the authority to protect the public welfare. However, it can certainly happen that, as a fruit of a previous dialogue, the authority would reach an accord or a compromise —a settlement— even formalizing it into a contract. Afterwards, it can happen that the authority issues a new administrative act modified completely or in part (or simply keeps the former act). In the case of the amendment of the act, the authority will do it in this way, since the authority thinks that the new act does not infringe upon the public welfare now in play, but that it advances more fittingly as a whole than the previous one. In addition, the authority knows that the new act will not be challenged. However, that act is not the direct and immediate result of the settlement. The consequence of the settlement is an accord —about the basic question or about one or other of its aspects more specifically harmful for the faithful person affected— that secures their positions and guarantees that there will be no controversy. The administrative act that could have been issued immediately after simply takes as a *presupposition* the possible previous settlement, without being bound *formally* by it.

This is possible here because the administrative authority is the one competent in evaluating the implication of the public welfare in the matter. It is not this way in the judicial area, precisely due to the position of the *detachment* of the judge in respect to the interests in play (cf. c. 1431 § 1).

8. Cf., in this sense, E. LABANDEIRA, commentary on c. 1733, in *CIC Pamplona*; idem, *Tratado de Derecho Administrativo Canónico*, 2nd ed. updated (Pamplona 1993), pp. 434–435.

9. Cf. the text of P. CIPROTTI, in J. CORSO, "I modi di evitare...," cit., p. 51.

In contrast, it is not acceptable to submit these conflicts to the judgment of arbitrators, since this means of solution is characterized by the situation in which both parties pledge to respect the resolution —the "arbitral decision"— of a third party (see commentary on c. 1713), in such a way that the decision about matters in which only the authority is competent would have to be left in the hands of third parties —or their hierarchical superior— without guaranteeing that the decision— since it is now *imposed*, not *proposed*— is adjusted to the needs of the public welfare.

4. *Moment to attempt conciliation*

The Code does not formally impose this attempt at conciliation as a requirement before a recourse—as it has, on the other hand, with the previous *supplicatio*: cf. c. 1734— but it is simply limited to point out the interest that is obtained for a solution agreed upon before the resolution of the possible recourse. Precisely for this reason, there is no norm which subordinates the beginning of the passage of some time limits in order to arrive at the failure of the attempt at reconciliation, so that the time is counted without interruption from the date established with its general character (cf. cc. 1734 § 2, 1735 and 1737 § 2), and which counts against the one who considers himself wronged through the administrative act. Therefore, for practical purposes, whomever thinks that he must have recourse about an administrative act has to consider that the time periods established are peremptory and are not interrupted. He must continue through them, taking the necessary steps in each time limit, without overlooking the fact that, in a parallel way, there would be ongoing conversations whose purpose was a search for another possible solution.

In fact, the passage of the time periods without an appeal would block the later presentation of the recourse from any hope of attaining an accord, while the presentation of the recourse in time does not close the possibility of reaching that accord. It is on account of this that § 3 of this canon indicates that the moment of trying the alternative solution is "principal" once the "entreaty" has been presented before the recourse of c. 1734, and before the time periods are exhausted to make recourse. However, there is nothing to prevent one, even though recourse has already been presented, from still seeking a solution different from the decision of the hierarchical superior. For that reason a call is made to the superior —parallel to what the judge does in c. 1446 § 2— so that he might encourage the parties to seek that solution, and there may always be fostered a hope of success. This is done while keeping in mind that the passage of the time to resolve the case (cf. with the general character, c. 57) is not interrupted in virtue of these attempts.

1734 **§ 1. Antequam quis recursum proponat, debet decreti revocationem vel emendationem scripto ab ipsius auctore petere; qua petitione proposita, etiam suspensio exsecutionis eo ipso petita intellegitur.**

§ 2. Petitio fieri debet intra peremptorium terminum decem dierum utilium a decreto legitime intimato.

§ 3. Normae §§ 1 et 2 non valent:
1° de recursu proponendo ad Episcopum adversus decreta lata ab auctoritatibus, quae ei subsunt;
2° de recursu proponendo adversus decretum, quo recursus hierarchicus deciditur, nisi decisio data sit ab Episcopo;
3° de recursibus proponendis ad normam cann. 57 et 1735.

§ 1. Before having recourse, the person must seek in writing from its author the revocation or amendment of the decree. Once this petition has been lodged, it is by that very fact understood that the suspension of the execution of the decree is also being sought.

§ 2. The petition must be made within the peremptory time limit of ten canonical days from the time the decree was lawfully notified.

§ 3. The norms in §§ 1 and 2 do not apply:
1° in having recourse to the Bishop against decrees given by authorities who are subject to him;
2° in having recourse against the decree by which a hierarchical recourse is decided, unless the decision was given by the Bishop himself;
3° in having recourse in accordance with Cann. 57 and 1735.

SOURCES: —

CROSS REFERENCES: cc. 53–57, 200–203, 1465, 1733 § 2, 1735, 1736 §§ 1–2, 1737

COMMENTARY

Jorge Miras

1. *Nature of the petition sought beforehand*

The request is here formulated that the author of the administrative act revoke or amend the petition as an unavoidable prior requirement (*antequam quis recursum proponat, debet...*)[1] for the lodging of the

hierarchical recourse in the cases and under the conditions established in this canon.

The text of the canon distinguishes that petition from hierarchical recourse (cf. also cc. 1733 § 2, 1735 and 1736 § 1). Canon 57 describes the petition and the recourse as different from administrative actions, directed to obtain a decree from the authority. The petition and the recourse appear separated by means of the particle "or" (see commentary on c. 57). In fact, the petition is not a recourse properly speaking, because it does not possess the character of a *challenge* that is proper to every recourse: the presentation of that petition does not set up the juridical conflict between the authority and the affected member of the faithful. Because of that, c. 1733 § 3 advises the avoidance (*praecavere*) of the controversy once that petition has been presented for an amendment or revocation. The *Relatio* about the *Schema* of the *CIC* of 1982 explains: "the petition has the purpose of having the decree reconsidered and, if possible, for an avoidance of recourse."[2]

Therefore, one is simply dealing with a petition, request or entreaty, which can be correctly inserted, according to Labandeira, among the realities historically designated with the name of "supplication."[3] that is prior to the true recourse. Above all, its purpose is to forewarn the ecclesiastical authority about anything that is considered prejudicial through its administrative act and which may provide an interest in a recourse for the purpose of making a reconsideration of the decision possible and hoping, either for it to be reaffirmed in order to face the recourse, or to have the decision revoked or modified.

The *animadversiones praeviae* to the *Schema* "Concerning the Administrative Process," sent for consultation on April 20, 1972, explained the reason for this requirement prior to the recourse in this way: "From those matters which have been mentioned about the preferable changes which are proposed in the schema, it is already clear what system has been accepted into the schema about challenges to administrative acts. However, it can be briefly explained in this way: a) no recourse can be proposed against the decree of an administrative body unless the petition precedes it, made out to the author of the precept, for the purpose of having the decree revoked or changed. The importance of this norm, the purpose of which is to protect good order and the authority of the superior, is not concealed from anyone."[4] Certainly, it seems reasonable for the

1. Cf., regarding the wording of this norm and the introduction of its obligatory nature, J. CORSO, "I modi di evitare il giudicio amministrativo," in *La giustizia amministrativa nella Chiesa* (Vatican City 199), pp. 33ff; especially pp. 52–55.
2. *Comm.* 15 (1984), p. 85.
3. Cf. regarding this question E. LABANDEIRA, *Tratado de Derecho Administrativo Canónico*, 2nd ed. updated (Pamplona 1993), pp. 435ff; idem, commentary on c. 1734, in *CIC Pamplona*.
4. *Comm.* 4 (1972), p. 38.

ecclesiastical authority that issues an administrative act in the exercise of its function of governing not to be surprised through the intervention of a recourse, where its first learning about it might be the communication made through his hierarchical superior. This could happen in such a way that he would be bereft of the opportunity of trying to better explain the reason for the decision, or the reason for having modified or retracted the decision, once influenced by the reasons that arose in the dialogue with the member of the faithful who considers himself aggrieved.

2. *Period of presentation*

Paragraph two sets forth a binding period of ten useful days (cf. cc. 201–203), between the legitimate notice or notification of the administrative act to the revocation or amendment of that which is being sought (cf. cc. 54–56). In this case, one will always be dealing with an administrative act *effectively issued* by the authority. The reason is that the recourse against the "presumed decisions" in virtue of the administrative silence does not require a previous solicitation (*see below*, n. 5).

Once the ten days has expired without the *supplicatio* having been presented (unless it has expired *uselessly*, because the interested party did not know about the existence of the act, or the possibility of making this petition, or because he could not present it: c. 201 § 2), the member of the faithful who considers himself wronged by the administrative act loses his right to recourse (c. 1465). The reason is that the later recourse will not be admitted if there has not been a previous *supplicatio*. Nevertheless, if, despite everything, the author of the act admits the petition outside of the deadline and responds to it, he reopens the possibility for the interested party for recourse.[5] However, the possibility of having the recourse admitted seems more doubtful when it is based upon a negative response that has been presumed in virtue of the administrative silence toward a petition that has been presented outside of the deadline (c. 1735). Still, it can always be attempted, since the requirement of the previous *supplicatio* has apparently been satisfied and the person making recourse could prove that he presented the petition in *useful* time.

3. *Formal requirements and content*

a) *Personal activity of the interested party*

The Code expressly anticipates (cf. c. 1738) the possibility —and even the necessity in some cases— in which *the one making recourse*

5. Cf. E. LABANDEIRA, *Tratado...*, cit., p. 437.

acts, in the properly named hierarchical recourse, by means of an advocate or procurator, but not as such for the *supplicatio*. The motive is clear. Here, one is not dealing with recourse but with a simple petition (*see above*, n. 1). Therefore, the personal intervention of the interested party is sufficient, and he does not thereby bring about a lack of defense, since the juridical defense of his situation occasioned through the administrative act will begin properly with the later recourse. Nevertheless, nothing prevents the interested party from seeking advice that he thinks is opportune; and asking, on the part of an advocate, before presenting the *supplicatio*, although afterwards he acted personally.

b) *Written format*

With respect to the formal requirements of the *supplicatio*, the Code sets up only one: the written form ("they must seek in writing the revocation or amendment of the decree from the author"). Here one can be dealing with writing in the form of an application or of a simple letter.

c) *Content*

At least the following points must be included in the writing:

— the necessary data to identify the administrative act to which reference is being made;

— the identification of the person presenting the petition for the revocation or amendment, and his domicile for the purpose of notifications;

— at least one explicit petition: that of the revocation or the reforming of the act; it can also contain the petition for its suspension, but if it does not contain it, the law automatically adds it to the "supplicatio," and at that point an *iter* parallel to that of the recourse begins, reference being made only to its suspension (see commentary on c. 1736 § 2). For the admission of hierarchic recourse— which can be lodged for any just reason (c. 1737) — the motivation is necessary. On the other hand, for the *supplicatio* to be able to precede the juridical basis for the conflict, there is no formal requirement for a detailed explanation of the reasons, the proofs and allegations. It suffices that the interested party manifests in a summary fashion that he considers himself wronged through that administrative act.

— the signature and date upon which the petition is presented.

The writing can be hand-delivered to the chancery, to the secretariat or to the office corresponding to each case. This office will issue the certification of reception and a registration (in that case, the seal placed upon a copy of the writing with the date of entry, its registration and the seal of the corresponding curia would be sufficient). It can also be sent by certified mail with a receipt of acknowledgement, in such a way that the date of its presentation and its being received is evident.

4. *Effects*

The effects of the presentation of the *supplicatio* are the following:

— at times, it implies the automatic suspension of the act *ipso iure*: cf. c. 1736 § 1;

— in the rest of the cases, it constitutes an implicit suspension of the execution of the administrative act, which puts into motion a special deadline for the administrative silence of ten days, relative only to the possibility of an autonomous application of suspension of the act to the hierarchical superior of its author (cf. § 1 and c. 1736 § 2);

— *it initiates attempts at reconciliation in the matters to which* c. 1733 refers;

— it marks the day from which counting begins (c. 203 § 1) in the computation of the deadline of thirty days so that the author of the act may respond to the petition. When that deadline passes, the way to hierarchical recourse is expedited for the interested party (c. 1735).

5. *Acts that can be recurred to without previous "supplicatio"*

Paragraph three lists the cases in which the *supplicatio* is not demanded as a requirement for the placing of the recourse:

a) when one makes recourse to the bishop against authoritative acts subordinate to himself. In this supposition, the possibility of direct recourse is due to the position of the bishop as the head of the particular Church, which constitutes his proper sphere of ordinary and immediate governance (cf. cc. 381 and 391). Because of this, his direct intervention, without any more steps in the matter, does not have the character that in a certain extraordinary manner can be observed in other suppositions.

b) when the decree which it attempts to challenge was issued in the resolution of a recourse (therefore an antecedent *supplicatio* already existed), unless the one who resolved it was the bishop. In that case, the previous *supplicatio* to the lower authority was not there (see the previous supposition), and the law has an interest in granting to the bishop that advantage "in order to protect good rule and the authority of the superior" (*see above*, n. 1).

c) if the recourse takes place in virtue of administrative silence, in the general hypothesis of c. 57 (three months), or in the specific hypothesis of silence before the *supplicatio* (thirty days: c. 1735).

d) when a response is made to the *supplicatio* with a new act that amends the previous one, but does not suffice in satisfying the one affected (cf. c. 1735). Both in this case as in the previous one, one is dealing with a logical exception. It is considered that the author of the decree has

already had the occasion to consider the matter again, and even has amended the points that he has considered could or must be reformulated. The necessity of the previous petition for the revocation would keep its original meaning, and would simply produce a delaying effect, which is undesirable (see commentary on c. 1735 § 2).

In these four cases, the peremptory deadline of fifteen useful days to make recourse (c. 1737 § 2) begins to transpire from the judicial notice of the act that is the basis for the recourse, without the expiration of the ten days established for the *supplicatio*.

1735 **Si intra triginta dies, ex quo petitio, de qua in can. 1734, ad auctorem decreti pervenit, is novum decretum intimet, quo vel prius emendet vel petitionem reiciendam esse decernat, termini ad recurrendum decurrunt ex novi decreti intimatione; si autem intra triginta dies nihil decernat, termini decurrunt ex tricesimo die.**

If, within thirty days from the time the petition mentioned in Can. 1734 reaches the author of the decree, the latter communicates a new decree by which either the earlier decree is amended or it is determined that the petition is to be rejected, the period within which to have recourse begins from the notification of the new decree. If, however, the author of the decree makes no decision within thirty days, the time limit begins to run from the thirtieth day.

SOURCES: —

CROSS REFERENCES: cc. 54–57, 200–203, 1734, 1737 § 2

COMMENTARY

Jorge Miras

This norm anticipates two possible reactions from the author of the administrative act before the *supplicatio*, which is regulated in canon 1734.

1. *Issuance and notification of a new decree*

When the answer to the petition for an amendment or revocation of the previous act is effected by a new decree, this decree can have different contents:

— *the rejection of the petition*, which assumes the confirmation of the previous act;

— *the revocation of the administrative act* and the restoration of the situation that preceded it;

— *the issuance of a new administrative act that in some aspects amends the one preceding it.* In this case, the amendment can satisfy the person affected by the first administrative act. It could be the consequence of attempts toward conciliation that should have begun in the presentation of the *supplicatio*, but it also could happen that the person still

considers himself wronged by the new act and, consequently, maintains his interest in appealing it.

In all these cases, the peremptory deadline of fifteen useful days to make recourse (c. 1737 § 2; cf. also cc. 201–203) is computed from the date of the legitimate notification of the new decree (cf. concerning the notification, cc. 54–56).

If one is treating a decree of rejection of the *supplicatio*, the original administrative act, which has been confirmed by this last decree, is challenged. In contrast, when one is handling a decree that amends the previous act, recourse is made against the new decree, without a need to present the previous *supplicatio*, since the deadline begins to count from the notification of the new decree (see commentary on c. 1734; n. 5, d).

2. *Absence of reply*

It can also happen that the authority does not respond to the *supplicatio*, as described in c. 57 § 1, which refers to the absence of an administrative response "when the interested party legitimately presents a petition ... to obtain a decree." As a general rule, once three months have passed without an answer from the authority, a negative answer is presumed, as far as the effects of the appeal are concerned (c. 57 § 2). Yet the possibility remains open that specific norms might prescribe other different deadlines. Precisely because of that, the final incidental clause of c. 1735 establishes one of those special deadlines for administrative silence for an amendment or revocation in c. 1734. If the authority has not formally made any decision, the expression *nihil decernat* has its precise meaning here: "if he has not issued a new decree"— within the deadline of thirty days. The deadline to make recourse (cf. c. 1737 § 2) begins to count from the thirtieth day from the presentation of the *supplicatio* (cf. cc. 202 § 1, 203).

One of the objectives of the relative shortness of the deadlines in the matter of recourse against administrative acts (see commentary on c. 1737: n. II, 1) is to avoid delaying situations of unnecessarily continuing the conflict. These situations might progress to the stage of being a detriment to the community.[1] That same reason can explain this point: for these cases, there should be established a special deadline of administrative silence noticeably less than the one already provided by a general rule. When the *supplicatio* is presented, it is actually announcing the intention to make recourse, unless the administrative act is revoked or modified to the satisfaction of the interested party. Therefore, the potential

1. Cf. J. HERRANZ, "La giustizia amministrativa nella Chiesa: dal Concilio Vaticano II al Codice del 1983," in *La giustizia amministrativa nella Chiesa* (Vatican City 1991), p. 24.

administrative conflict is already found in the beginning stage, and it would not be convenient for the member of the faithful who considers himself wronged to remain in a situation of uncertainty for a long period.

To conclude, in canon law, the silence of the administration *is not* an answer, but simply gives rise to a *presumption* of a negative response that permits the interested party to continue taking the necessary steps (see commentary on c. 57). However, the authority remains obligated to respond to the legitimate petitions, and can do so in the same fashion as c. 57 § 3, although the deadline has passed and recourse has already been lodged. Thus, if the author of the administrative act were to decide to amend or revoke it belatedly, he might do it, theoretically, after the presentation of recourse, which would then be bereft of an object (if the amendment eliminates the wrong on the part of the person making recourse). In those cases, c. 57 § 3 determines that the competent authority remains obligated to repair the possible damages caused for their delay. For example, such damages might include the costs that the lodging of the recourse would have presumably placed upon the member of the faithful, or other expenses that would eventually occur, stemming from the possible period of time during which the challenged act would have had efficacy, if its execution were not to have been suspended in the same manner as cc. 1734 § 1 and 1736.

1736 **§ 1. In iis materiis, in quibus recursus hierarchicus suspendit decreti exsecutionem, idem efficit etiam petitio, de qua in can. 1734.**

§ 2. In ceteris casibus, nisi intra decem dies, ex quo petitio de qua in can. 1734 ad ipsum auctorem decreti pervenit, is exsecutionem suspendendam decreverit, potest suspensio interim peti ab eius Superiore hierarchico, qui eam decernere potest gravibus tantum de causis et cauto semper ne quid salus animarum detrimenti capiat.

§ 3. Suspensa decreti exsecutione ad normam § 2, si postea recursus proponatur, is qui de recursu videre debet, ad normam can. 1737 § 3 decernat utrum suspensio sit confirmanda an revocanda.

§ 4. Si nullus recursus intra statutum terminum adversus decretum proponatur, suspensio exsecutionis, ad normam § 1 vel § 2 interim effecta, eo ipso cessat.

§ 1. In those matters in which hierarchical recourse suspends the execution of a decree, the petition mentioned in Can. 1734 also has the same effect.

§ 2. In other cases, unless within ten days of receiving the petition mentioned in Can. 1734 the author of the decree has decreed its suspension, an interim suspension can be sought from the author's hierarchical Superior. This Superior can decree the suspension only for serious reasons and must always take care that the salvation of souls suffers no harm.

§ 3. If the execution of the decree is suspended in accordance with § 2 and recourse is subsequently proposed, the person who must decide the recourse is to determine, in accordance with Can. 1737 § 3, whether the suspension is to be confirmed or revoked.

§ 4. If no recourse is proposed against the decree within the time limit established, an interim suspension of execution in accordance with §§ 1 and 2 automatically lapses.

SOURCES: —

CROSS REFERENCES: cc. 700, 1319, 1342 § 1, 1353, 1638, 1720, 1734, 1735, 1737 § 3, 1747, 1752

COMMENTARY

Jorge Miras

In addressing the challenges in general, it is customary to differentiate between two primary effects that are classically called "devolutive" (forwarding the question to the body that has to resolve the challenge by creating or exercising his competence) and "suspensive" (deflecting the effects of the challenged act until the challenge is resolved). As a rule, in the judicial arena, an appeal always suspends the execution of the sentence (cf. c. 1638). However, in contrast, in administrative recourse, the norm is the opposite. Thus, hierarchical recourse produces only a devolutive effect, except in cases as determined by law.

This clear difference between judicial and administrative competencies can be explained by the special characteristics of administrative activity, relative to the immediate exercise of the function of governance that officially follows from the public ecclesiastical welfare. The extreme importance and delicacy of the public welfare, the safeguard of which is entrusted to the ecclesiastical authority, makes it necessary to guarantee that the function of governance can be carried out with agility and without unnecessary obstacles. If by general rule the recourse (and the *supplicatio* itself, in accordance with the § 1 of this canon) were to suspend the execution of the challenged act automatically, one would have to fear the risk of a virtual paralysis for the ecclesiastical authority in situations when there is an obligation to make decisions which can be executed without delay. From that situation, it came about that it was preferred to set up a norm that suspension would not be the automatic effect for every recourse.

Nevertheless, this important prerogative of the administration (which strengthens those prerogatives constituted through the presumption of legitimacy and the executivity of its acts[1]) also implies a risk that an administrative act may cause injuries that might be very difficult to repair. For this reason, the possibility is also provided for the proper author of the act or his superior to suspend its execution with caution. Thus, one is dealing with an area where the harmonization of the very sensitive matters at stake is at the disposition of the prudence of the competent authority.

Let us look, in a schematic fashion, at the rules established for the suspension of the carrying out of administrative acts.

1. Cf., e.g., E. LABANDEIRA, *Tratado de Derecho Administrativo Canónico*, 2nd ed. updated (Pamplona 1993), pp. 415–417.

1. *Exceptional cases of the effect of automatic suspension*

In some serious cases, the law sets up the automatic suspension of a recourse, and § 1 of this canon extends in those cases the same suspensive efficacy to the presentation, not the recourse properly speaking, but including the preceding *supplicatio* as regulated in c. 1734. For example, this is what happens in recourse against the decree of expulsion of a member of a religious institute (c. 700), or against a decree that imposes or declares a penalty (c. 1353, in relationship with cc. 1319, 1342 § 1 and 1720). It may partially happen in the case of recourse against a decree of removal or transfer in which the faculty of the bishop is suspended from naming a new pastor while the recourse is pending (cc. 1747 and 1752).

2. *Procedure in the remaining cases*

When the specific norms applicable to the case do not expressly acknowledge the suspensive effect of the recourse (which happens *in ceteris casibus*), the general norm has to be followed in a fashion parallel to the development of the recourse:

a) *Implicit petition of suspension*

Once the *supplicatio* for amendment or revocation of the administrative act has been presented, the suspension is also automatically understood as having been requested *eo ipso* in the matters being insisted upon by the act (cf. c. 1734 § 1).

b) *Autonomous period of administrative silence for the request of suspension*

From the presentation of the *supplicatio*, there is a deadline of ten days for what the author of the act decides to do, but *only with regard to the suspension.*

c) *Anterior provisional suspension to the presentation of recourse*

Once the ten days have elapsed without any response, the interested party can direct his request for a suspension to the hierarchic superior — who is the same one who will have to resolve, in this case, the former recourse. He can provisionally grant it while the deadline is still running for the answer to the *supplicatio,* but only for serious causes —the evaluation of which corresponds to it— and taking precautions that the care of souls does not suffer any detriment (§ 2). While examining all the circumstances, such consideration might lead him not to grant the suspension. Here the hierarchical superior does not yet know of the recourse at the heart of the matter, but only of its suspension. Whatever the decision that he adopts in this moment, he will have to go back to it once the recourse has been undertaken (§ 3 and c. 1737 § 3).

d) *Provisional suspension ceases if recourse is not sought in the period*

If the recourse is not finally lodged (§ 4) once the deadline of fifteen days for the "supplicatio" (cf. c. 1735) has passed, the provisional suspension remains without effect. In this case, the administrative act can be executed without further requirements.

e) *Conformation or revocation of provisionally granted suspension*

Once the recourse is made, and if the provisional suspension was conceded, the hierarchical superior maneuvers himself into the position of deciding whether he is going to confirm or revoke it while the resolution of the recourse is pending (§ 3).

f) *Concession of the suspension that has been provisionally denied*

If the hierarchical superior denies the provisional suspension, he can still grant it when he has heard the recourse, once the circumstances of the case have been studied in depth. That concession is subject to the same conditions indicated by § 2 for provisional suspension (c. 1737 § 3).

The peculiarities of the process that has to follow the suspension in those cases in which the previous *supplicatio* is not demanded (see commentary on c. 1734: n. 5) are not expressly regulated in the Code. If the interested parties think it necessary, it is possible to begin the formality of the suspension before the lodging of the recourse, with the presentation of the request for provisional suspension to the hierarchical superior. This request could be granted and confirmed or revoked once the recourse has been presented. This interpretation seems in accord with the objective toward which the possibility of suspension of the execution of the administrative act has been anticipated. In those circumstances of direct recourse to the superior, this remains in force.

Finally, as is logical, a suspension that has been granted ceases when the ordinary recourses against the act are exhausted without success.[2]

2. For the suspension of the act for the duration of the contentious—administrative recourse before the Apostolic Signatura, cf. art. 108 of the *Normae speciales* of that tribunal: "Recursui adnecti potest instantia, allatis motivis gravibus vel documentis quibus innititur, ad obtinendam suspensionem exsecutionis actus impugnati." Cf., in this regard, G. LOBINA, *Elementi di procedura amministrativa canonica* (Rome 1973), pp. 15ff.

1737 **§ 1. Qui se decreto gravatum esse contendit, potest ad Superiorem hierarchicum eius, qui decretum tulit, propter quodlibet iustum motivum recurrere; recursus proponi potest coram ipso decreti auctore, qui eum statim ad competentem Superiorem hierarchicum transmittere debet.**

§ 2. Recursus proponendus est intra peremptorium terminum quindecim dierum utilium, qui in casibus de quibus in can. 1734 § 3 decurrunt ex die quo decretum intimatum est, in ceteris autem casibus decurrunt ad normam can. 1735.

§ 3. Etiam in casibus, in quibus recursus non suspendit ipso iure decreti exsecutionem neque suspensio ad normam can. 1736 § 2 decreta est, potest tamen gravi de causa Superior iubere ut exsecutio suspendatur, cauto tamen ne quid salus animarum detrimenti capiat.

§ 1. A person who contends that he or she has been injured by a decree, can for any just motive have recourse to the hierarchical Superior of the one who issued the decree. The recourse can be proposed before the author of the decree, who must immediately forward it to the competent hierarchical Superior.

§ 2. The recourse is to be proposed within the peremptory time limit of fifteen canonical days. In the cases mentioned in Can. 1734 § 3, the time limit begins to run from the day the decree was notified; in other cases, it runs in accordance with Can. 1735.

§ 3. Even in those cases in which recourse does not by law suspend the execution of the decree, or in which the suspension is decreed in accordance with Can. 1736 § 2, the Superior can for a serious reason order that the execution be suspended, but is to take care that the salvation of souls suffers no harm.

SOURCES: —

CROSS REFERENCES: cc. 19, 96–123, 299 § 3, 310, 1476–1480, 1733–1736, 1738, 1739

COMMENTARY

Jorge Miras

Beginning with c. 1737, some aspects of hierarchic recourse are regulated. In commenting upon the first paragraphs of this canon, we shall occupy ourselves with individuals and their lodging of recourse (the form, reasons, time limits and effects). For suspension of the act being appealed, to which § 3 refers, see the commentary on c. 1736.

I. SUBJECTS OF RECOURSE

Hierarchical recourse *juridically* establishes a controversy (which existed previously in a way not institutionalized in a juridical channel for a solution) between two parties with interests that are in conflict, and it has been submitted to the competent administrative authority to be resolved by use of its executive power, imposing the solution upon the parties by a decree. Therefore, there will always be an active party, whom the Code calls "the one making recourse" (c. 1738), as well as a passive or resistant party, whom the Code designates as *qui decretum tulit* (c. 1737 § 1) or the *auctor decreti* (c. 1733 §§ 1 and 3, 1734 § 1, 1735, 1736, 1737 § 1), and a competent hierarchical superior for resolving the recourse.

1. *The referral*

In studying the one making the recourse, one must take note of the requirements of being recognized juridically as a subject (juridical capacity) capable of acting in a hierarchical recourse (capacity to act). In addition, it is essential to explain what type of relationship has to exist with the act that is the subject of the recourse for the person to be admitted as an active party in a determined appeal (active legitimation). Although these two aspects —capacity and legitimation— are related, it is fitting to distinguish them carefully, both for their theoretical study and for their practical effects, since the confusion over them can have consequences regarding the viability and efficacy of hierarchical recourse as regulated by the Code.

a) *Capacity*

The capacity —the juridical suitability to be a subject in a legal system, or within the determined scope of an ordinance— is a requirement that the law establishes in the abstract. Therefore, it does not have a relationship with a determined administrative act.

The Code does not establish any special norm regarding who enjoys juridical capacity and what is required in the lodging of hierarchical recourse. Therefore, the general norms must be applied: *a)* if the one appealing is a physical person, the capacity to act will be in force (c. 19) through cc. 1476–1479, which presuppose the general requirements for capacity given in cc. 97 and following; *b)* if one is dealing with a juridic person, the norm of c. 1480 applies, which must be understood in the light of the general norms contained in cc. 113–123. Therefore, every human person can take recourse, baptized or not, if over 18 years of age. Minors and those lacking the use of reason must be represented through their parents, guardians, or tutors, although in some cases, minors with the use of reason who have completed fourteen years might be admitted to act personally (cf. cc. 96–99, 1476, 1478–1479).

They also have the capacity to make recourse through their legitimate representatives, juridical persons, public or private. One authentic response of June 20, 1987 declared that groups of the faithful —including private associations of the faithful which do not merit the status of "persons" (c. 310)— without statutes which have been at least reviewed by the competent authority (c. 299 § 3), are not capable of lodging recourse as a unified body.[1] On the other hand, members of the same private institutions, the statutes of which have been the object of that review, can defend their rights and interests *jointly,* although not as an association (c. 310). This last point is expressly recognized by the authentic response cited, according to which they can make recourse *qua singuli christifideles, sive singillatim sive coniunctim agentes.*

b) *Legitimation*

However, not every subject juridically capable of making recourse can challenge *any* administrative act. In addition to the capacity, the law establishes other conditions that must be met so that a subject can challenge a determined administrative act. That special situation of the subject capable with respect to a determined act is called *active legitimization.* Therefore, the capable subject who is legitimated can make recourse through his relationship (in the terms provided by the law) to the act, the object of the recourse, or through his position with regard to the effects of that act.

1. "D. Utrum christifidelium coetus, personalitatis iuridicae, immo et recognitionis de qua in can. 299, §3, expers, legitimationem activam habeat ad recursum hierarchicum proponendum adversus decretum proprii Episcopi dioecesani. R. Negative qua coetus: affirmative qua singuli christifideles, sive singillatim sive coniunctim agentes, dummodo revera gravamen passi sint. In aestimatione huius gravaminis, iudex congrua discretionalitate gaudeat oportet." *AAS* 80 (1988), p. 1818. Cf., for an analysis of the cited reply, which speaks in a confused manner of "active legitimization" in the formulation of the *dubium*, J. MIRAS, "Respuestas de la Comisión Pontificia para la interpretación de los textos legislativos. (Comentarios)," in *Ius Canonicum* 61 (1991), pp. 211–217; cf. also the commentary of P. BONNET, in *Periodica* (1989), pp. 261ff.

This canon expresses the requirement for legitimization, establishing whoever considers himself wronged by the administrative act and is interested in its revocation or amendment (c. 1734) may lodge hierarchical recourse. The verbs used by the norms which allude to this requirement (whoever *contends* that he has been injured, whoever *thinks* that he has been injured by a decree) indicate that absolutely certain and objective evidence for the existence of an effective injury is not demanded. Neither do they have to be understood as being in a purely subjective sense, as if the legitimization would reside simply in a psychological state that would empower that person to make recourse for anything he might conceive is hurtful to him. This would be the equivalent to a concept of a potentially universal and arbitrary legitimization, foreign to any juridical system, even the canonical.

On the contrary, to have recourse against a particular administrative act is legitimate only for persons who can experience injury if the act is confirmed and executed or can benefit if the recourse is successful.[2] This happens when the interested party has seen that a strictly subjective right has been injured through an administrative act, but a similar occurrence would happen where the one making recourse, in virtue of his juridical situation can been seen as injured through the administrative act.[3]

Therefore, it is necessary that it can at least be observed that the recourse does not constitute an absolutely foolhardy or groundless attempt. In reality, the interest that makes the recourse legitimate is not an interest with a certain qualification, so that it does not lapse into an unspecific general process. Nor is it a substantial juridical situation for which someone is the titleholder, but which consists in a question *de facto* protected indirectly by the norm.[4]

That is what the doctrine seeks to express when it enumerates the characteristics that must be fulfilled for the subject to become legitimate. In a decree of the Apostolic Signatura, it was established that the legitimating interest has to be "personal, direct, actual, and based at least

2. Cf. E. LABANDEIRA, "El recurso jerárquico ante la Curia Romana," in *Ius Canonicum* 60 (1990), pp. 449–465 (printed in idem, *Cuestiones de Derecho Administrativo Canónico* (Pamplona 1992); cf., especially, pp. 416–417).

3. Regarding the irrelevance, mostly admitted by learned teaching, of the distinction, in Canon Law, between the subjective law and the legitimate interest cf., e.g., A. RANAUDO, "Il ricorso gerarchico e la rimozione e trasferimento dei parroci nel nuovo Codice," in *Dilexit iustitiam. Studia in honorem Aurelii Card. Sabattan*, (Vatican City 1984), pp. 503ff (even though this author maintains the validity, in a technical sense, of the strict concept of interest which he describes); P. MONETA, *Il controllo giurisdizionale sugli atti dell'autorità amministrativa nell'ordinamento canonico* (Milan 1973), pp. 251ff; J. LLOBELL, "Associazioni non riconosciute e funzione giudiziaria," in *Monitor Ecclesiasticus* 113 (1988), pp. 379ff; E. LABANDEIRA, "El objeto del recurso contencioso administrativo en la Iglesia y los derechos subjetivos," in *Ius Canonicum* 40 (1980), pp. 151–166 (printed in idem, *Cuestiones de Derecho Administrativo...*, cit., cf. especially pp. 48–51; etc.).

4. E. LABANDEIRA, "El recurso jerárquico ante la Curia...," cit., p. 418.

indirectly upon the law and [adequately] proportioned."[5] However, more than the concrete qualifications that accompany the interest, what is important for the actual possibility of access to the recourse is the content that jurisprudence assigns to each of those requirements. Perhaps the manner in which the cited decree interprets them and the later application of that doctrine in another case,[6] show an incipient restrictive inclination of jurisprudence on this point, which has been received with a certain apprehension on the part of learned teaching.[7]

Certainly, the genuine canonical sensitiveness to justice and a profoundly personalitic orientation of the juridical institutions seem to demand a refined attention toward all the situations eventually worthy of consideration and protection.[8] This attention should not be seen as derived solely from a restrictive interpretation that was not imposed in accordance with the juridical norms. There is a provision that these norms admit of a reading that is broader and more flexible, more in accord with the finality toward which they tend (cf. *a sensu contrario*, c. 18).

c) *Capacity and legitimation are requirements for the granting of the recourse*

To understand the extent of this problem, one should notice that the active legitimization is not the foundation of the controversy, but it is a *formal and prior topic*. This topic constitutes a requisite for the admission of the recourse, but it does not prejudge in any way the decisions that the superior who has admitted it can adopt, once he carefully finds out its basis. The person becomes absolutely legitimated to make recourse, yet he might not succeed in his attempt.

Precisely in order for him to treat a previous topic, the superior who receives a recourse is not in a situation to resolve it at that moment — without a rebuttal, without proofs, without guarantees— with a decision about the substance of the recourse. The law does not ask him to do so. To admit the recourse, he must briefly verify that because of the reasons for the recourse there is the presence of a certain foundation that justifies the intervention of the one making recourse as an interested party in the recourse.

5. STSA, Decr. November 21, 1987, "Castillo Lara ponente," n. 5 *in fine*, in *Comm.* 20 (1988), pp. 88–94.

6. STSA, Decr. "de causa Cincinnaten," January 26, 1990, in *Notitiae* 26 (1990), p. 144.

7. Cf., e.g., E. LABANDEIRA, "La defensa de los administrados en el Derecho Canónico," in *Ius Canonicum* 61 (1991), pp. 271–288 (printed in idem, *Cuestiones de Derecho Administrativo...*, cit., pp. 467–490); P. MONETA, "I soggetti nel giudizio amministrativo canonico," in *La giustizia amministrativa nella Chiesa* (Vatican City 1991), pp. 55–70, especially, pp. 65–66.

8. Cf., in this sense, P. MONETA, "La tutela dei diritti dei fedeli di fronte all'autorità amministrativa," in *Fidelium Iura* 3 (1993), pp. 281–306.

For that reason the terms of the authentic response cited before do not seem very fortunate, which, while speaking of another question, incidentally recognizes active legitimization for subjects who are capable *dummodo revera gravamen passi sint.*[9] From its literal interpretation, that expression was superimposed upon the previous requirement of the legitimization for the substantial question of the recourse. However, it was to be a substantial question that had to be resolved *in limine litis*, with the juridical guarantees for the faithful that the hierarchic recourse intends to establish.[10] Of all the ways, for different reasons,[11] it seems clear that the intention of that authentic response is not to restrict, in such a drastic way and by an indirect means, the actual possibility of the exercise of a right of the faithful. (The direct object of the *dubium*, according to its content, rests heavily upon the confused terminology with which it is formulated, and is clearly within the *capacity* of the groups of the faithful without personality to lodge recourse, not the legitimization).

Therefore, the norm about legitimization continues to be current in all of its effects the way it is expressed in the present canon. The *admission* of the recourse is not conditional upon the subject having *actually* been injured, but upon what appears to be his condition through an administrative act with a certain foundation. Even better (since in this assumption the principle to be applied is *favorabilia amplianda*), the recourse is granted as long as it does not appear as absurd and without basis. In reality, recourse is reasonably accessible to the faithful— as reasonably accessible as the Code outlines it, which may be resolved later on with a clear and accurate rationale. This would appear to be more favorable for the peace and the community of the faithful, and therefore of the general interest and of the good administration in the Church,[12] than the easy non-admission of recourses based upon an excessive demand for formal and unnecessary requirements for the legitimization. Nevertheless, it remains the jurisprudential task to determine the practice in this subject matter.

On the other hand, regarding legitimization, the question of the collective interests, as well as that of the "diffused interests," has been firmly established in the teaching. Thus, the ones who have a determined title juridically cannot be stated specifically. However, their protection interests an entire succession of subjects. In these cases, despite the fact that a direct and exclusive title does not exist, it can happen that one is treating interests truly worthy of protection, which would remain without effective protection for want of a subject formally legitimated to make recourse against it. This could happen in the situation in which jurisprudence does

9. Cf. *supra*, note 1.
10. Cf. *Principles*, 6–7.
11. Cf. J. MIRAS, *Respuestas de la Comisión...*, cit.
12. Cf. E. LABANDEIRA, commentary on c. 1737, in *CIC Pamplona*.

not adopt a flexible point of view toward the question. Otherwise, one is dealing with a flexibility that would not be totally new in canon law.[13]

d) *Other possible interested parties*

In addition to the subject or subjects directly affected by the administrative act, other interested persons could exist who are interested in its modification or its revocation —or even in its confirmation— who must be heard by the superior, if possible, before the case is resolved (cf. c. 50). They could even formally join the claim of one of the legitimated parties in the recourse as "collaborators." This figure is not foreseen for by the Code in this area, but it is perfectly possible. In fact, procedural canon law has provided various assumptions for the intervention of third parties in judicial cases: cf. cc. 1596–1597.

2. *The resisting party*

Passive legitimization offers fewer problems, because it primarily and directly belongs to the authority who issued the administrative act being appealed. The authority is expressed clearly with the words "author of the decree," which the Code repeatedly uses in its references to the resistant party. The only ones excluded from this assumption of passive legitimation, by reasons of constitutional order, are the Roman Pontiff and the Ecumenical Council (see commentary on c. 1732). The intervention of other subjects or persons who have an interest in supporting the recourse against the act as collaborators was also made possible.

3. *The superior "ad quem"*

The determination of the competent authority to receive the recourse is narrowed down to the identification of the hierarchical superior of the author of the administrative act in question. Thus, for administrative acts issued by authorities subordinate to the bishop, the superior *ad quem* will be the bishop. The administrative acts of the diocesan bishop will have to be brought to the competent pontifical dicastery depending on its material (PB, 19 § 1). If various dicasteries could be competent, the recourse can be directed to one of them or alternatively to various

13. Cf., e.g., P. GANGOITI, "De iure standi in judicio administrativo hierarchico et in Altera Sectione Signaturae Apostolicae laicorum paroecialium contra decretum episcopi, qui demolitionem paroecialis ecclesiae decernit," in *Angelicum* (1988), pp. 392 ff; J. LLOBELL, "Associazioni non riconosciute e funzione giudiziaria," in *Monitor Ecclesiasticus* 113 (1988), pp. 379 ff; P. MONETA, "I soggetti nel giudizio amministrativo...," cit.; E. LABANDEIRA, "La defensa de los administrados...," cit. One can detect a more adequate grasp of the legal aspects of this question in the sentence c. Fagiolo cited by C. GULLO: see introduction a Lib. VII, part. I, tit. IV, 2, and note 24.

dicasteries, since the question of the determination of competence will be resolved through the procedure provided for in *Pastor Bonus*, 20 and *Regolamento generale della Curia Romana*, 129.

Administrative acts of the Roman dicasteries cannot be the object of hierarchical recourse, since there is no competent hierarchic superior. The dicasteries can only be the ordinary object of a contentious-administrative recourse to the Apostolic Signatura, as provided for in *Pastor Bonus* 123 (cf. RGCR, 135 and 136 § 4).

Insofar as the determination of the competent superior in the case of administrative acts issued within the seat of a body that is an association or an institute of consecrated life is concerned, that determination will have to be provided for by their statutes and their constitutions, plus common law.

II. INTERPOSITION OF RECOURSE

1. *Period for recurring*

§ 2 of c. 1737 points out that, for the lodging of the recourse, there is a peremptory time limit of fifteen useful days (cf. cc. 201–203), which have to be counted:

— from the legitimate notice of the administrative act (see cc. 54–56) in the cases in which a previous *supplicatio* is not necessary (see commentary on c. 1734: n. 5);

— from the notification of the decree which answers the *supplicatio*, when the author of the administrative act upon which a challenge is being attempted issues that decree within the time limit of thirty days (see commentary on c. 1735: n. 1);

— from the thirtieth day from the presentation of the *supplicatio*, when there had not been an answer to the petition (see commentary on c. 1735: n. 2).

Once that time limit has passed, the interested party —if he knew and could make recourse, since one is treating of "useful" days— loses the possibility of lodging hierarchical recourse. In addition, if the provisional suspension of the execution of the administrative act in question had been decreed, it ceases automatically and the act can be executed beginning with that date (c. 1736 § 4).

2. *Form of interposition*

Recourse can be directly presented to the competent hierarchical superior, or to the author of the act. However, this recourse must be transferred immediately to the superior without further delay. The reason is that, beginning with that moment, the matter slips out of his competence. The author of the act that is the subject of the recourse could also continue attempting ways for its resolution apart from recourse (cf. c. 1733 § 3), but simultaneously and in a parallel manner to its being substantiated. This is done without concealing the negotiation regarding the recourse, which must be *immediate* on his part.

He has to intervene in writing, and the following points must be clearly indicated:

— the necessary data to identify unequivocally the administrative act to which it refers, even attaching, if possible, a copy of the act;

— the identification of the person who is presenting it, as well as his domicile for the purposes of receiving notifications;

— when an advocate or procurator is taking part in the recourse, his mandate to act in the name of the interested party;

— the superior to whom it is directed;

— the object of the one making recourse with respect to the administrative act being challenged and with respect to the juridical situation affected. Moreover, if the execution of the challenged act was not suspended automatically (cf. c. 1736 § 1), and if it did merit the provisional suspension either, he can once again give notice of recourse, since the superior who resolves it has the faculty to agree with it officially or at the insistence of the interested party (cf. § 3). In this case, nothing prevents him from also introducing a claim for indemnification for the injuries caused by chance through the act being challenged (cc. 128, 57; and *CCEO*, cc. 1000 § 3 and 1005; see commentary on c. 1739: n. 3);

— the reasons which give rise to the recourse, with documentation to support them —or at least a brief description of them, since in the brief time limit which is provided for him it is not easy to obtain this disclosure, and it is always possible to present it once it is admitted by means of the recourse and within the time limits which the competent superior sets up— plus argumentation that can lay the foundations for the reasons;

— the documentation (for example, written copies for property, contracts, statutes, decrees of confirmation of appointments, acts and certifications, etc.) which support the juridical situation in virtue of which the interested party considers himself legitimated to make recourse; or at least, the disclosure of the documentation of a required nature which could be provided;

— the date and signature of the person appealing or of his procurator.

3. *Reasons for recourse*

Hierarchical recourse must be provided with reasons, which immediately prompts one to ask what these reasons could be.

Likewise § 1 of this canon states that the interested party can make recourse *propter quodlibet iustum motivum*. Here one is dealing with a very broad expression, which absolutely excludes recourse that is presented without any reason or for a reason that cannot be qualified as just.

Certainly, that wide scope for the acceptance of the rationale indicates an idea of recourse as *properly administrative*. This designation removes it from the actions of the jurisdictional court. In fact, an assembling of the hierarchical recourse with a jurisdictional tone will end up restricting its reasons, centering on the questions of legitimacy and of strict justice. On the other hand, an idea of an administrative court does not transform the hierarchical superior into a judge. But, he does keep his position as a competent authority to administer for all of its effects in the same sphere and matter as the author of the act that is the subject of recourse—also insofar as the resolution of the recourse is concerned— but at a superior level. The authority that resolves the recourse is not a judge who applies the strict law, but *a Superior who governs*, and this is reflected in the broadness of his powers of decision (see commentary on c. 1739).

The practical extent of the broad wording of c. 1737 with respect to the rationale could be revealed by saying that it is possible to base recourse upon any reason that the superior can justly and legitimately take into consideration in order to adopt a decision within the limits of c. 1739. In other words, the petition can be made because of all the reasons because of which the superior *can* make his concession of the recourse.[14]

4. *Effects of the interposition of recourse*[15]

The lodging of the hierarchical recourse establishes, or at least, brings into existence, the competence of the superior *ad quem* about the question that is the object of the controversy. This is what is known by the expression "devolutive effect," in speaking of the effects of recourse (see commentary on c. 1736). Insofar as the suspensive effect is understood as a general rule, it is not automatically produced here in this action, but

14. Cf., e.g., E. LABANDEIRA, "Il ricorso gerarchico canonico: 'petitum' e 'causa petendi'," in *La giustizia amministrativa nella Chiesa*, cit., above all pp. 77–82 (Spanish vers. in idem *Cuestiones de Derecho Administrativo…*, cit., pp. 493 ff); P. MONETA, "La tutela dei diritti dei fedeli…," cit., p. 299.

15. Cf., for a more detailed treatment, E. LABANDEIRA, *Tratado de Derecho Administrativo Canónico*, 2nd ed. (Pamplona 1993), pp. 439ff.

through the express decision of the superior, based on a serious reason, and according to what § 3 of c. 1737 (see also the commentary on c. 1736) sets up.

In addition, once the recourse has been presented, the obligation to answer (cf. c. 57) is born for the superior. He must either refuse it, giving reasons for his acceptance (cf. c. 51), or he must resolve it, likewise giving the reasons for its basis once it has been admitted (cf. RGCR, 136 § 3). Canon 57 established as a rule the time limit of three months for the resolution, although the special norms that regulate the material of what is being treated could establish other different time limits. For the rest, once the recourse has been accepted, the superior might, if necessary, communicate to the parties that the time limit for the resolution of the recourse —because of its complexity or for other reasons, which must be specified— will be prolonged for a determined time (cf. RGCR, 136 § 2)

Up to this point, these norms are the only general norms or procedures for the resolution of recourses accepted within the *CIC*. Clearly, they are incomplete. For example, there are other norms for recourse to the dicasteries of the Roman Curia.[16]

16. Cf. RGCR, 134–138; C. GULLO, "Il ricorso gerarchico: procedura e decisione," in *La giustizia amministrativa nella Chiesa*, cit., pp. 85–96.

1738 **Recurrens semper ius habet advocatum vel procuratorem adhibendi, vitatis inutilibus moris; immo vero patronus ex officio constituatur, si recurrens patrono careat et Superior id necessarium censeat; semper tamen potest Superior iubere ut recurrens ipse compareat ut interrogetur.**

The person having recourse always has the right to the services of an advocate or procurator, but is to avoid futile delays. Indeed, an advocate is to be appointed *ex officio* if the person does not have one and the Superior considers it necessary. The Superior, however, can always order that the one having recourse appear in person to answer questions.

SOURCES: —

CROSS REFERENCES: cc. 1481–1490

COMMENTARY

Jorge Miras

1. *Right of the one making recourse to the services of an advocate or procurator*

Canon 1738 accepts for administrative recourses the general rule in the canonical procedural system, according to which, save for an express prescription to the contrary, the party can personally carry out all the activity that belongs to the process (cf. c. 1481 § 1). Therefore, legal assistance is a right that belongs to the person making recourse, but it is possible for him not to use it. This guarantee of the right to legal representation indicates that the substantiation of hierarchical recourse has a properly challenging character. That means that the parties may present allegations and proofs in favor of their interests,[1] and they have to proceed in a formal context that requires a specific preparation. This is allowed since on many occasions the technical intervention of legal assistance is indispensable.

1. Cf., e.g., E. LABANDEIRA, commentary on c. 1738, in *CIC Pamplona*; J. HERRANZ, "La giustizia amministrativa nella Chiesa: dal Concilio Vaticano II al Codice del 1983," in *La giustizia amministrativa nella Chiesa* (Vatican City 1991), p. 24; M.J. ARROBA CONDE, commentary on c. 1738, in A. BENLLOCH POVEDA (Dir.), *Código de Derecho Canónico. Edición bilingüe, fuentes y comentarios de todos los cánones*, 3rd ed. (Valencia 1993); etc.

Otherwise, the norms applicable to the intervention of the patron will be the general norms (cf. cc. 1481–1490), and they will have to consider the specific norms established for the performance before the dicasteries of the Roman Curia (PB, 183).[2]

In addition to this right of the person making recourse, the duty and the capacity of the hierarchical superior who has to resolve the recourse are regulated here.

The superior has the duty to name a patron or advocate for the person making recourse if he considers it necessary and the one making recourse has not done so. This is a decision left to the judgment of the superior who will have to decide if the absence of a patron can produce a notable disadvantage to the person making recourse because he appears incapable of personally defending his interests in an adequate way. If this is so, the superior must designate a patron *ex officio*. On the other hand, he does not have to do this if he does not judge that it is necessary.

Moreover, even in those cases in which the person making recourse is represented by a patron designated by him or *ex officio*, the superior "can always" cite him to personally appear and be interrogated. In addition, in this case the opportunity or the necessity of ordering the personal appearance of the interested party still depends upon the judgment of the superior.

2. *The phrase "vitatis inutilibus moris"*

In administrative recourse, the abbreviation of the situation of the pending conflict is a value that is specially sought after. This is manifested, for example, in the brevity of the time-limits (see commentary on c. 1737: n. II, 1), or in the setting up of a shorter time limit than the general one for the administrative silence that precedes the *supplicatio* (see commentary on c. 1735).

Here, one notices once again that the interest that the person making recourse "always" has is now declared together with the expression "vitatis inutilibus moris." This phrase is added to the declaration of the right to use the services of an advocate or procurator. The person making recourse "always" has the right to have one. The expression appears from the very first of the *schemata De procedura administrativa*. In those directives, another similar form referring to the intervention of an expert or a patron (or advocate) in the process of forming an administrative act makes its appearance. However, this was not accepted into the *CIC*. Such

2. Cf. also, regarding the advocates, JOHN PAUL II, m.p. *Iusti Iudicis*, June 28, 1988, in *AAS* 80 (1988), pp. 1285ff, developed by Secr. St., *Ordinatio*, December 15, 1990, in *AAS* 82 (1990), pp. 1630–1634.

a clause was inserted to explain the content of those *schemata* and to answer the observations made for them.[3] This incidental clause cannot be interpreted as a restrictive formula for the right to learned assistance, which is *always* given in the recourse, but simply as an exhortation to avoid unnecessary delays, in line with the principle of promptness that seems to dominate the procedure of administrative recourse. Therefore, if the one making recourse thinks that he must avail himself of an advocate or procurator, the superior who is resolving the recourse *cannot be opposed to this*. At most, he will be able to direct and control the activity, ensuring that unnecessary delays are avoided, but always without harming the appellant's defense.

3. *Intervention of the advocate on the part of the author of the act*

Among the exceptions which c. 1481 imposes on the general rule that personal parties can act in a contentious trial are the cases in which there enters into play the public welfare. In these exceptions, the official designation of a defender for the party who does not have one is always obligatory.

In the recourse against an administrative act, the public welfare is always in play, either actually or potentially. The reason is that this objective must prevail over every legitimate intervention by the ecclesiastical authority. However, the intervention by an advocate or procurator acting in support of the author of the act being challenged is not imposed here. This is probably done for two reasons: (1) because it is supposed that the author of the administrative act has the capacity to protect the small area of the public welfare that is affected by himself (which is "his interest" in these cases) and (2) because the superior who resolves the recourse also has the duty, *ex officio* to look after those same interests, but in a position hierarchically superior (see commentary on c. 1739). Therefore, the non-intervention of an advocate or procurator on the part of the authority whose act is being challenged does not for that reason mean putting the public welfare in danger. Nevertheless, nothing keeps the author of the challenged act from being represented by an advocate or procurator,[4] if he thinks it appropriate.

3. Cf. *Comm.* 2 (1970), pp. 192–194; 5 (1973), p. 238.
4. Cf. E. LABANDEIRA, commentary on c. 1738, in *CIC Pamplona*.

1739 Superiori, qui de recursu videt, licet, prout casus ferat, non solum decretum confirmare vel irritum declarare, sed etiam rescindere, revocare, vel si id Superiori magis expedire videatur, emendare, subrogare, ei obrogare.

Insofar as the case demands, it is lawful for the Superior who must decide the recourse, not only to confirm the decree or declare that it is invalid, but also to rescind or revoke it or, if it seems to the Superior to be more expedient, to amend it, to substitute for it, or to obrogate it.

SOURCES: —

CROSS REFERENCES: cc. 10, 35, 51, 124, 1734, 1737

COMMENTARY

Jorge Miras

1. *Position of the superior in hierarchical recourse*

a) *The superior as competent administrative authority*

The enumeration of the superior's faculties regarding the resolution, considered in their intimate connection with the breadth allowed for the motivation of the recourse (see commentary on c. 1737: n. II, 3), confirms the option of the Code that hierarchical recourse is true administrative recourse. As a matter of fact, in the *animadversiones previae* to the *Schema De procedura administrative* which was sent to the bishops' conferences and the dicasteries of the Roman Curia on April 20, 1972, it was explained that "the hierarchical superior, discerning the recourse, ordinarily can not only confirm the act or declare it invalid, but also can reform it, using the same powers which the author had. The administrative tribunal however can only confirm it or declare it invalid, while the authors themselves of the decree are given the faculty and duty, if the case calls for it, of producing a new decree."[1]

In securing a resolution, the superior is not limited by the restrictions that affect the judge in the contentious-administrative recourse, which can be admitted only because of reasons of legitimacy (cf. c. 1445

1. Cf. *Comm.* 4 (1972), p. 38; cf. also *Comm.* 2 (1970), p. 193.

§ 2; *PB* 123).[2] This is because the proper task of the judge is not to make decisions of governance, but simply to judge if a determined means adopted by the administrative authority is in accord with the canonical system, and to impose his sentence upon the parties in conflict. In contrast, the hierarchical superior is an administrative authority, and resolves the recourse *through administrating,* governing *in actu* about the same matter that is the object of the decision of the author of the challenged act, which has passed from his competence. His functions regarding the question are the same as those the author of the act had, but in a hierarchically superior grade.[3]

Consequently, the superior does not have to limit himself to verifying the legitimacy of the administrative act being challenged. However, he can —if he considers it suitable— retract the matter and make a new decision. This action is found among equally legitimate possibilities for a solution based on his own authority and in the knowledge acquired during the substantiation of the recourse. In that respect, the literal tone of the canon is significant: "it is lawful for the superior ... depending on the case, not only to confirm the decree but also to declare it invalid" —up to here, it could be understood that we are moving in the terrain of legitimacy— "but also ... if this seems to suit the superior more ..." In this drafting, one must keep in mind legal considerations and requirements for validity, as well as the possibility of resolving the recourse abiding by the reasons of suitability, convenience, good administration, etc.

The interpretation that the *Regolamento generale della Curia Romana* gives to this norm confirms this idea, since it establishes that the dicasteries, in resolving recourses, examine them both for legitimacy and for "merit" (art. 136 § 1).

b) *Concept of "expediency"*

However, one must note that a decision adopted for reasons of expediency is not the same as a decision that is not reasoned. Therefore, a recourse grounded in reasons of expediency is not recourse that is without reason. In this respect, it has been written, "if we wish to take expediency as a reason to challenge the act, we must give it an objective sense. In principle, it can be said that that act is expedient which is adequate to reach the social purpose that one expects of it. In contrast, inexpedient describes the act that is lacking in that potentiality. However, for that expediency or inexpediency to be taken into consideration by the law, it is not sufficient that the act has failed, that is to say, that it has been useless

2. Cf., regarding the sense of legitimacy in the contentious-administrative process, J. MIRAS, "El contencioso-administrativo canónico en la Constitución Apostólica 'Pastor Bonus,'" in *Ius Canonicum* 60 (1990), pp. 409–422.

3. Cf., for other consequences of that conception, above all regarding the possibility of "reformatio in peius," E. LABANDEIRA, *Tratado de Derecho Administrativo Canónico*, 2nd ed. (Pamplona 1993), p. 449.

or harmful. It is also necessary that at the moment in which the so-called non-juridic law was broken, it would emanate from a good, scientific, technical, etc.administration of the act. Expediency operates within the sphere of discretion and ends up limiting the freedom of the administration. When the ordinance grants discretional power, there is a concern that its exercise would be controlled relative to certain objectives."[4]

Therefore, the concept of "expediency" is not synonymous with arbitrariness, caprice or lack of reason. Above all, it presupposes legitimacy. Between strict legality and illegality there is a narrow area —yet more or less broad, according to the case— in which discretion comes into play. This is not a mere opening for the capricious exercise of authority, but for the *possibility of choosing among equally legitimate means* for a concrete case. The decision that is adopted in each case will be based upon some determined reason, criteria, appraisal, etc.

Placed before the discretion of the law, the criteria of expediency, convenience, good government, good administration, efficacy, etc., are not purely imaginative or subjective. For that purpose, the canon supplies ample powers that are conceded to the superior for an exercise *prout casus ferat*, or for a decision that *magis expedire videatur*. In this area, criteria enter that do not take the form of juridical mandates, but contribute to determining the extent to which the discretional means of the authority must go, what values or preferences must be present, etc.[5] Many times one will treat matters of pastoral guidance or encouragement. At other times, one will have to refer to criteria taken from science, art or the economy. The lack of deliberation for that type of criteria does not make a discretional act strictly illegitimate, but it can make it unsuitable, and, for that reason, capable of being challenged.

2. *Resolution of the recourse*

Hierarchical recourse is resolved by means of a special decree of the competent superior, given in writing, which must make known the reasons upon which it is based (c. 51). Insofar as its content is concerned, the decision can range from a total confirmation of the challenged act to a total substitution with a contrary act.

a) *Confirmation of the challenged act*

Suppose that the superior at least considers that the decision contained in the act being challenged is legitimate, since the legitimacy is in every case a necessary requirement —although it is not always sufficient

4. E. LABANDEIRA, "Il ricorso gerarchico canonico: 'petitum' e 'causa petendi,'" in *La giustizia amministrativa nella Chiesa*, cit., pp. 80–81 (Spanish vers. in idem, *Cuestiones de Derecho Administrativo Canónico* (Pamplona 1993), pp. 506–507).

5. For some examples, cf. ibid.

or decisive— for the confirmation of the act. This decision implies the rejection of all the petitions of the one making recourse. The substance of the administrative act that has been challenged is put into the same terms in which it was issued.

b) *Declaration of nullity*

The second possibility of a decision that the norm contemplates is to declare the challenged act null (*irritum declarare*). In some cases, the administrative act is null *ipso iure* for an absolute lack of power of competence on the part of the author (cf. c. 35), for the lack of some essential element, for the absence of one of the requirements established by the law for the validity of that type of act (cf. c. 124 § 1), or because of the presence of some vice of procedure expressly sanctioned with nullity (cf. c. 10). But, that nullity does not automatically work, since administrative acts enjoy a presumption of legitimacy that only yields proof to the contrary, in addition to the presumption of validity that holds for every apparent juridic act (cf. c. 124 § 2). Therefore, supposedly null acts that affect the external forum —the norms refer only to those acts about hierarchical recourse: cf. c. 1732— bind their recipients until a declaration of nullity takes place.

If this comes to pass, since the effects —juridical and *material*— produced up to that moment depended upon an absolutely invalid act, the declaration of nullity will also have efficacy from the date of the issuance of the act the nullity of which is declared as far as possible (*ex tunc*). In these cases, the superior will also have to consider the question of possible injuries, which will have to be compensated in accordance with c. 128. The prudent foresight of this eventuality can be one of the causes that would recommend suspending the execution of the administrative act (cf. cc. 1734 § 1, 1736 and 1737 § 3).

c) *Rescission*

The challenged act may also appear to be contaminated by some vice which, although it does not imply its absolute nullity, or its nullity *ipso iure*, could give cause for its being annulled at the insistence of the interested party. In canon law, this is traditionally called rescission[6] (cf., for example, cc. 125 § 2, 126, 1451 § 2). Here, one is dealing with situations *capable of being annulled*. In these cases, as long as the annulment is not called for nor obtained, the act continues to be efficacious (cf., for example, cc. 149 § 2, 166 § 2).

In these cases, the decision of the superior is not merely declarative (the vice would not be sufficient in itself to annul the act, or of not mediating in that decision), but *constitutive* (causing the nullity), since the

6. On the capacity of canon law to be rescinded, cf. E. LABANDEIRA, *Tratado...*, cit., pp. 399–401.

annulment will produce effects *ex nunc*, not automatically from the moment of the issuance of the annulled act.

Justice will demand, in a hypothesis of this type, the combining of the possible retroactivity adequately —total or partial— of the effects of the annulment with the legitimacy of the situations which would have been born under the protection of the act which was efficacious up until that moment, but which can be annulled.

d) *Revocation*

Revocation is the normal way for the cessation of administrative acts (c. 47; cf. c. 58 § 1 for the decrees; c. 79 for the rescripts which grant privileges; and c. 93 for those which grant dispensations). It consists in the issuance of a decree that leaves the former act without effect, with the need to establish in its place another act referring to the matter that has been affected.

The revoked act does not thereby have any errors of nullity, or other defects that make it able to be annulled. In those cases, the adequate means would be either the declaration of nullity or the declaration of the rescission. In these cases, one is dealing with an act which could still exist, but which the superior revokes because he thinks that it is unnecessary or counterproductive in some way. Administrative *expediency* does not have the perfectly defined parameters of legitimacy, but it also does not constitute an area of arbitrary or casual willfulness in the exercise of authority. Every administrative act must answer to some criteria, either to an evaluation of the circumstances, or to a judgment about the common good and the particular good in the case. These are the matters that influence the authority to make that decision and not another. The same can be said of the act through which it is decided to revoke a previous administrative act.

e) *Amendment or correction*

Correction is given when the superior considers that he has to keep the challenged act partially, but with some amended points. The aspects leading to the purpose for the amendment could be material errors, collateral circumstances that the superior does not consider suitable, some determined time limits established in the challenged act or the calculation of age, etc. However, the corrected act retains substantially the same content of the challenged act.

Correction can be carried out to satisfy the one making recourse. In fact, when he presents the *supplicatio*, one request that the person making recourse can make is for the amendment of the act (cf. c. 1734). Correction also can be carried out as a way of perfecting an act that the superior considers substantially correct but not proper or possible to confirm *sic et simpliciter* in its original draft.

Finally, it must be noted that correction is distinguished in the *CIC* as different both from *sanation* from the errors of nullity or those elements which make the act rescindable (cf., for the judicial sentences, cc. 1616, 1619 and 1622), and from convalidation, which would not be a mere amendment.

f) *Substitution*

The last of the decisions foreseen in this canon is the substitution of the administrative act by another. This is not the same as revocation, because revocation does not have for its objective the establishment of a new situation, although it leaves the previous act without effect. On the other hand, substitution occurs when, in place of the challenged act, another is enacted, with different content. Here, one is not dealing with a simple correction or amendment, because one cannot speak of substitution if the new act substantially maintains the previous one.

Substitution is properly given when one cannot perceive a substantial identity with the challenged act. This possibility appears in the text of the canon under two titles, which, if they are not redundant, could be referred to as two kinds of substitution:

— *subrogation* is the substitution of the challenged act with another distinct one (the Code uses this word to refer to the substitution of persons: cf. cc. 1425 § 5, 1624);

— *obrogation is* the substitution of the challenged act by another that is not simply distinct, but contrary, such as one deduces from the use of that same verb which c. 53 uses. Such could be the adequate resolution, for example, in cases in which the superior considers that the challenged act harms a true and proper right and thinks that the revocation of the harmful act is not sufficient. However, he considers it advisable to point out the recognition of that violated right by means of an administrative act that expressly protects it.

3. *The question of reparation of damages*

To conclude, it is advisable to consider that, except in the case of confirmation, the superior will have to keep in mind the possible responsibility for damages (c. 128), which c. 57 declares are expressly applicable in the matter of administrative acts. *Pastor Bonus* has established in article 123 a method for a jurisdictional complaint made at the request of the interested party concerning that possible responsibility of the administration. However, in the hierarchical procedure, it must be one of the matters that the superior officially examines, even when the interested party does not include it in the recourse among his *petita*. For practical effects, the one making recourse will see himself benefited if, when he is preparing the recourse, he has already included among his petitions the one relative

to the eventual indemnification of damages without waiting for the intervention of the contentious-administrative controversy. The reason is that he can at least have at his disposal two pronouncements about the question. The *CCEO*, later than the *CIC* in its definitive drafting, explicitly contemplates that among the requests of the hierarchical recourse, there is the indemnification of damages (c. 1000 § 3). It also establishes the criterion to indicate what authorities incur in responsibility and in which measure, in the case of a challenged act (c. 1005). These points are absent in the *CIC* and will have to be integrated at least jurisprudentially.

SECTIO II

De procedura in parochis amovendis vel transferendis

SECTION II

The Procedure for the Removal or Transfer of Parish Priests

INTRODUCTION

Ángel Marzoa

1. *Preliminary considerations*

The contents of this section are inspired in the mandate of *Christus Dominus* 31, to "revise and simplify the manner of proceeding in the transfer and removal of pastors, with the objective that the bishop, always observing natural and canonical equity, can better provide for the needs of the good of souls."

In light of this text, the following considerations must be kept in mind: *a)* the substantive reason which the bishop must weigh in the decision is the good of souls; *b)* the fact that the decision must be taken by the bishop, since this decision definitely and directly reverts to his responsibility of governing the diocese; and *c)* the fact that the decision for the removal or the transfer does affect a member of the faithful who is the legitimate titular of an office, and, as such, that member of the faithful must be treated with fairness.

The substantive act of the removal or transfer relative to the granting of the office of pastor is treated in cc. 522 and 538. Those that the legislator is now occupied with are the considerations of *b)* and *c)*.

Therefore, section II is incorporated within the context of the necessary juridical safeguarding, both of the action of governing by the bishop, and of the rights which go with the titleholder of the office. As a matter of fact, although the final criterion that gives motivation for the eventual removal or transfer of a pastor is the "good of souls," one cannot forget that both the one who issues the decree and its recipient must also be protected in how the proceedings are undertaken.

These postulates cannot afford to be obscure, not only because the decree looks to an action of governance justified through the protection of those faithful subjects who benefit through the ministry of a determined

parish, but also because this action is somewhat hindered because of the necessity of having to protect the person who sees himself affected by his removal or transfer. Nor can this act itself remain obscure since the titular of the office is also the subject of rights that are opposed to an action of governance constituting an obstacle blocking the legitimacy with which the superior exercises his responsibility of keeping watch over the common good. As it was set up in the principles, "the principle of juridical protection must be applied equally in canon law to the superior and to his subjects, in such a way that any suspicion of arbitrariness in the ecclesiastical administration would disappear."[1]

Canons 1740–1752 lead to that point of regulating in such a delicate matter a procedure that directs the exercise of the power of government. In this way, if the substantive reason for the decree of removal or transfer responds to the exercise of the responsibilities of the administration in watching over the good of souls, the fact that these means of removal or transfer are seen as specific procedures in this place of the *CIC* is due to the will of the legislator to protect both the same action of governance, as opposed to the eventual opposition of the person being disciplined, and the respect owed to the juridical position of the pastor, as opposed to a possible arbitrariness of the administration.

2. *The particular location of the procedures for removal or transfer*

Within part V, this second section is occupied, in two chapters, with the procedures that have to be followed in the removal (chapter I) and transfer (chapter II) of pastors.

Although these canons are found located within book VII, they contain only two procedures of an administrative nature. This means to say, among other things, that the general canons that regulate the procedural activity are not a direct reference for the development of these particular procedures. On the other hand, the common norms concerning administrative acts (cc. 35–47), and some of the canons are applicable by their general character, to the administrative decrees (for example, cc. 50–51 and 57). Finally, the immediately preceding canons (cc. 1732–1739) will convey the process that the decree of removal or transfer must follow, when it is challenged.

For the rest, the location of these two procedures within the book *De Processibus* is not new. It was also in the *CIC* of 1917 within part III, *De modo procedendi in nonnullis expediendis negotiis...*, in the book

1. *Principles*, 7, in *Comm.* 1 (1969), p. 83.

dedicated to processes (book IV). Here, the removal of unmovable pastors (Title XXVII, cc. 2147–2156) and movable pastors (Title XXVIII, cc. 2157–2161) was regulated, as well as the transfer of pastors (Title XXIX, cc. 2162–2167). This reference to *CIC* of 1917 is appropriate insofar as its two warnings in the introduction:

a) What is regulated is only the removal and transfer of pastors without preserving the old distinction between *removable* and *non-removable* pastors. This distinction was abolished by *Christus Dominus* 31, where a revision and simplification was requested of the "manner of proceeding in the transfer and removal (...), so that the bishop can better take care of the needs of the good of souls." This conciliar mandate has already been incorporated within the contents of c. 522, but its most direct consequence is this section.

b) Furthermore, what is presented are only the procedures for the removal and the transfer of pastors, which —with these reservations being made— are already found in the *CIC* of 1917 within one part III of book IV, *De Processibus*. However, there is a particular difference in that that part of the *CIC* of 1917 also took care of some penal procedures, which now have disappeared. This circumstance clarifies any doubt about the non-penal nature of the contents of this section. This has nothing to do with the circumstances for the imposition of penalties (cc. 1717–1731, *De processu poenali)* immediately before the administrative procedures of part V in which we find ourselves engrossed, but they have been grouped into a distinct part.

3. *Content of these norms*

The contents of this section develop what has been laid out in c. 538 § 1, where one considers the discontinuation from office of pastor by removal or transfer. At the same time, the same general norms must be kept in mind for the transfer (cc. 190–191) and removal (cc. 192–195) of the titular of an ecclesiastical office. Lastly, the connection with c. 522 is compulsory. In fact, in accord with c. 522, "the pastor must have stability" in the discharge of his office. This is translated as "having to be nominated for an indefinite time," or, when the bishops' conference decides to legislate through a decree in this way, "for a determined time" (see the commentary on c. 522,). However, it is never to be interpreted in such a way that remaining in office depends exclusively upon the will of the superior. In this sense, it is fitting to emphasize the pronouncement of the legislator in favor of stability, supporting the mandate of *Christus Dominus*, 31: "so that the bishop can proceed more easily and adequately for the care of parishes." He then states his reason: "let the bishop be able to provide more adequately for the good of souls." This provision is to be done in a way so that, in principle, "the pastors, each one in his own parish, will

enjoy the stability in his post which the good of souls requires" (CD, 31; see the commentary on c. 522).[2]

Thus, with a view of the criteria which must inspire the nomination of pastors (stability, the good of souls, and, in the performance of this good, the possibility of changes in the title holder of pastor of the parish), these canons are directed toward addressing whoever is legitimately the titleholder of the office of pastor, whether this comes with a nomination for an indefinite time or because he finds himself still within the time period for which he was named.

4. *Connection with the substantive norms (c. 522)*

The care with which these procedures are treated makes one think of them as a finely tuned instrument designed within the mind of the legislator for habitual use. That would not keep with the criterion adequately safeguarding the necessary freedom of the bishop to provide for the good of souls, especially if he were to make the naming of pastors on a habitual basis for a determined period of time. Moreover, one would have to consider up to what point the institutionalization and generalization of the nomination for a determined time[3] is in agreement, not only with the meaning of the act itself which the legislator foresees as an ordinary course for the procedure of removal or transfer, but even with the literalness of c. 522, and at the same time with the necessary consideration of the personal dignity of the priest, the titular to the office in question. Would there not be implied a certain presumption of non-availability —and therefore a bias— in the consideration that the appointment for a determined time is preferable, coming with the objective of avoiding the "inconveniences" of an established procedure when the *bonum animarum* demands the change in the title-holder of an office? It is —it seems to us— a better principle of governing to consider as sufficient the guarantees foreseen by the legislator precisely by means of these procedures. Consequently, one should not prejudge that the nomination for an indefinite period of time can, in normal circumstances, constitute an excessive hindrance in the search for the good of souls.

One possible question concerns the grounds that would merit a provision by the Code for having appointments for a determined period of time. This situation is not rare; for example, there are appointments for

2. For the arguments of this interpretation, cf. A. MARZOA, "El concepto de parroquia y el nombramiento de párroco," in *Ius Canonicum* 29 (1989), pp. 458 ff. Also idem, *Nombramiento de párrocos y el criterio de estabilidad*, in J. MANZANARES (Ed.), *La parroquia desde el nuevo Derecho Canónico* (Salamanca 1991), pp. 60 ff.

3. The appointment *ad certum tempus* was admitted —pursuant to the provisions of c. 522— by the First General Decree of the Spanish Bishops' Conference, July 7, 1984, in art. 4, which qualifies it as a faculty that "a Bishop can employ whenever he deems it appropriate; it is not, however, mandatory for him in the nature of a law": BOCEE 1 (1984), p. 101.

determined years for the exercise of sacerdotal ministry. There is the appointment of priests coming in from other dioceses for a certain time period for testing with the purpose of taking the necessary steps toward incardination that, perhaps, has been requested (cf. cc. 268 ff); then there is the appointment of a priest for a temporary assignment to another particular diocese without his losing his incardination in the diocese *a qua* (cf. c. 271 § 2). Perhaps there are also appointments for recently created parishes.

Then, there is the appointment that could follow a removal for objective reasons based on the person of the priest (for example, cf. the classification of reasons of c. 1741), etc. In other words, the rule applies to those situations where one can foresee with sufficient probability or with certainty that, once the time has passed, one will have to proceed to making the change. Therefore, the *flexibility* of acting that the automatic termination of the nomination offers is justified.

However, for the changes unforeseen *a priori*, there are removal and transfer, and each applies for appointments *ad certum tempus* and *ad tempus indefinitum*. As John Paul II has reminded us, the bishop is the "sentinel and the guardian" in his spiritual function. Among his responsibilities there is considered that of his responsibility to get a "clear perception and a benevolent respect for the successes and failures, for the dynamic initiatives or the deplorable acts of negligence which mark out the path of the People of God."[4] In this sense, it is worthwhile to weigh and to evaluate the risk that, in the generalization of the appointing *ad certum tempus* , there might arise a certain laxity in the duty of the bishop in his keeping watch with a permanent solicitude —in no way equivalent to a lack of confidence— over the efficacy of the parochial ministry. In reality, the fact that the possible negative or less-than-perfect situation will cease of itself, and in a manner solely contingent with the expiration of the time of the appointment might easily provide a temptation to rely on the automatic nature of the time limits as the solution for the situations which would require more urgent action, namely, by means of the suitable procedures. The result would be the consequent neglect of the good of souls, which is really the strength of this section.

5. *Promptness in pastoral management and legality in the formation of administrative acts*

To facilitate flexibility of governing, eliminating unnecessary obstacles is without a doubt useful and even desirable for the producing of administrative acts. However, in the present situation it is unnecessary to

4. JOHN PAUL II, *Discurso a los Obispos franceses de la Región Centro con ocasión de su visita "ad limina,"* January 11, 1997, in *Ecclesia*, March 1, 1997, n. 2.830, p. 27.

stress that praiseworthy objective to the point of systematically avoiding the procedures of this section II: namely, by utilizing the method of avoiding the practice of naming pastors for an indefinite period of time. This would be done under the impression that, in principle, the procedures being referred to are not also sufficiently "agile" for the removal or transfer.

As a matter of fact, the fulfillment of the requirements set up in cc. 1742 (removal) and 1748 (transfer), contain nothing that would delay the removal or transfer beyond what would be the prudent time limit to decide for the renewal of the nomination, or a different nomination for the case where the previous nomination ceases because of the passage of the time limit. In every case, for the reasons which are recognized in the canons, the decision must demonstrate that it does not mean anything more than the fulfillment of what has been provided for by the law in order to protect juridically both the exercise of the responsibilities of governing on the part of the administration, and the responsibility toward the designated person being administered by this act of governing.

It does not seem that the delays demanded for the necessary protection of rights ought to be considered as a harmful principle for the good governance of the church, no more than it could give rise to certain abuses of those who wish to use the established precautions in order to avoid the underlying substantive formulation. It always seems preferable to tolerate possible abuses that could be derived from a "clever" appeal to the procedural requirements *ad validitatem* with a purely dilatory intent. This intent, for the purpose of taking precautions against those abuses, ignores a guaranteed procedure for more than enough reasons of convenience. In any juridical ordinance, the exigencies of the principle of legality[5] involve this danger.

Therefore, these formalized norms for removal or transfer must not be seen as obstacles to the action of governing, but as a true service. This service is performed both for the one who is exercising this function —for he is the party primarily interested in exercising this function in an efficacious and always legitimate, just and suitable manner, under the protection of legality, without causing unnecessary damages and for those who are governed. These latter parties are interested in order to ensure that the decisions that affect them are not improvised to the point of "suspected arbitrariness" (Principles, 7).[6]

5. For the regulation of the procedure for the formation of administrative acts as a concrete manifestation of the principle of legality, cf. J. HERRANZ, *La giustizia amministrativa nella Chiesa dal Concilio Vaticano II al Codice del 1983*, *La giustizia amministrativa nella Chiesa* (Vatican City 1991), pp. 30–31.

6. See in this same work, J. MIRAS, commentary on c. 50: *La regulación del procedimiento de formación de los decretos.*

6. *Conclusion*

In summary, supporting the mandate of *Christus Dominus* 31, the legislator is carrying out a revision and a simplification of the way to proceed in the transfer and in the removal of pastors, so that the bishop can better look after the needs of the good of souls. This indicates that, in principle, the mind of the legislator is the normalization of the nomination process for an indefinite period of time. However, at the same time, in order that the stability that derives from those nominations —in itself advisable for the *bonum animarum*— may not be able to degenerate into a sense of perpetuity or ownership of the title of the office, there has been set up a regulated procedure for the removal or transfer. With this procedure, the ordinary means are worked out by which the superior can watch over the good of souls by means of his prudent freedom to evaluate and to decide in the matter of a change of destination. This procedure, in its turn, also guarantees for the passive subjects respectable expectations that the decisions that affect them are adopted in a reasonable and just manner. Neither is there a presumption of a rebellion on the part of the priest nor arbitrariness on the part of the bishop. A course of action is simply regulated which must be conformed to law —the principle of legality— always with a view, as its greatest aspiration, the good of souls, souls who are affected through the exercise of the office in question.

Without prejudice to the details that are given in the commentary for the different canons, there is a notable difference between the reasons for removal and transfer. Therefore, as in the case of removal, the causes, in principle, will always be of a negative character, having their roots *de facto* in the exercise of the ministry (cf. c. 1740: the harm or inefficacy of the ministry, and 1741: grave damage, inexperience or sickness, the loss of good name, grave negligence, or a bad administration of assets…). In the case of transfer, the assumptions are of a positive nature (cf. c.1748: one is treating here in principle the pastor who "manages" a parish "fruitfully"). As is logical, this different perspective is reflected in a formalization more open to those that lead to the transfer, as against the stricter formalization of those acts that are necessary for removal.

CAPUT I
De modo procedendi in amotione parochorum

CHAPTER I
The Procedure for the Removal of Parish Priests

1740 **Cum alicuius parochi ministerium ob aliquam causam, etiam citra gravem ipsius culpam, noxium aut saltem inefficax evadat, potest ipse ab Episcopo dioecesano a paroecia amoveri.**

When the ministry of any parish priest has for some reason become harmful or at least ineffective, even though this occurs without any serious fault on his part, he can be removed from the parish by the diocesan Bishop.

SOURCES: c. 2147 § 1; PCIDSVC Resp., 7 iul. 1978 (*AAS* 70 [1978] 534)

CROSS REFERENCES: cc. 35–47, 134, 145, 184, 192–196, 522, 528–535, 538, 682

COMMENTARY

Ángel Marzoa

Removal is one of the causes of loss of office that is considered in c. 184 for offices in general. It is considered in c. 538 for the office of pastor.

1. *General requirement for removal from an office*

Canons 192–195 establish the general requirements of the administrative act (cf. cc. 35ff) for removal from an office, which can be synthesized in the following way:

a) One has to be dealing with a decree legitimately presented by the competent authority (c. 192); a legitimate decree is issued by one with executive power (cc. 35 and 48), and in writing (c. 37 in relationship

with 51). This is accomplished after previous investigations, necessary proofs and with an interview with the party concerned (c. 50).

b) The decision must be based on *causas graves*, both for the office conferred for an indefinite period of time (c. 193 § 1), and, if it is given before the prearranged time, in the case of an office conferred for a determined period of time (c. 193 § 2). These are the only two possibilities foreseen for the naming of pastors (cf. c. 522). Note the difference in the *causas justas* that are required in the case of removal from an office that has been conferred *ad nutum auctoritatis* (c. 193 § 3). From these canons, the particular qualification of these causes and its necessary interpretation must be deduced.

c) The decree must be issued following the procedure determined by the law for each case (c. 193 § 1).

d) Notification must be made in writing for the decree o produce its effect (c. 193 § 4; cf. c. 54 § 2). The form of notification of the particular decrees is regulated by the general rule given in cc. 54–56.

e) The author of the decree must provide for the support of the one that has been removed for a suitable period of time (c. 195).

2. *Specifics regarding removal from a parochial office*

For pastors, one must keep in mind other particulars that specify the general norms about the decree of removal:

a) The only *competent authority* is the diocesan bishop (c. 538 in relation to c. 134 § 3) and those equivalent to him (the reference of c. 134 § 3 to 381 § 2: see the respective commentaries). Consequently, it cannot be one who simply holds ordinary executive power, like the vicar general (unless he has received a special mandate: cf. c. 134).

b) A pastor who is a member of a religious institute or incardinated in a society of apostolic life will have to abide by the reference of c. 538 § 2 to the norms of c. 682 § 2.

c) The need for a grave reason that is established in c. 193 is not eliminated by c. 1740 in declaring that the removal can be done "for any reason." Instead, it sets up a criterion for giving the status of external reality to that seriousness of this situation. This criterion makes the gravity reside precisely in the effect that has been produced. Those reasons, whatever they are, must in every case be those that make the ministry of the pastor harmful or inefficacious, and for that reason, they are serious. On the other hand, it is not necessary that serious blame be placed on the shoulders of the party concerned. In other words, one is dealing with objective reasons, related to the good of souls (necessarily presumed in the indeterminate concepts of harm or inefficacy in the carrying out of the ministry). It is for these grave reasons that this good can be seen as seriously harmed (the word "seriously" is justified by the specificity already

pointed out in c. 193, in contrast to the references of §§ 1–3). In every case, c. 1741 establishes a statement of possible reasons— by no means exhaustive, in which one clearly fulfills this qualification.

In short, the diocesan bishop will have to effect the removal. The reasons for the removal do not necessarily imply the guilt of the pastor, but are of a nature that either his ministry harms the faithful, or his ministry has been rendered inefficacious. Consequently, removal ensues.

3. *The administrative, not penal, nature of removal*

For the assumptions in which the possible reason for the removal had been constitutive of a delict (cf. especially cc. 1378–1389), the expiatory penalty of privation is in order (cf. cc. 1336 § 1, 2°). Privation is imposed with the understanding that one will then try the case via a penal process (cc. 1341, 1717–1731), or the administrative procedure for the imposition of penalties (see the commentary on c. 1341). It is never the procedure for removal, which is provided only for cases in which one prescinds from the causal element of the blame of the party concerned. In fact, the *CIC* (see commentary on c. 192) does not use the term *privation* in a haphazard way, as the *CIC*/1917 did (cf. c. 192 of the *CIC*/1917). However, the *CIC* has adopted a distinction, which was already in the previous code, according to which the doctrine spoke of "removal" for cases in which administrative procedures were followed and of "privation" for the penal cases. Thus, in c. 184, removal and privation of office as distinct situations for the loss of office are enumerated, as situations distinct from the loss of office. These are regulated in cc. 192ff and 196 respectively, in a different way from the *CIC*/1917.

In the previous legislation, the doctrine introduced the discussion about whether an administrative procedure of removal from an office and a trial for an imposition of a penalty of privation from the same office can be carried out simultaneously. The debate found its support from the Decree *Maxima cura* of Pius X, about the administrative removal of pastors. It had prohibited beginning an administrative procedure when a criminal judgment was pending. Part of the doctrine remained, after the codification of 1917, so that the prohibition remained in force in such a way that a procedure of removal could not be begun while a process for a delict was going on, where the penalty was the privation from office. As García Barberena points out, this debate —now that the norm of the Decree *Maxima cura*[1] has been derogated— was influenced very much by an insufficient distinction, insofar as the nature and the purposes were concerned,

1. SCCong, Decr. *Maxima Cura,* August 20, 1910, in *AAS* 2 (1910), pp. 636–648. The prohibition is in c. 31 § 1. For a study of this Decr. cf. A. AMOR RUIBAL, *La amoción administrativa de los párrocos* (Santiago de Compostela 1912), especially p. 191.

between the criminal trial and the procedure of removal.[2] In fact, the criminal process is performed in the penal context. It considers the pastor as the subject who is blamed for a determined delinquent behavior. The procedure for removal, on the other hand, looks immediately at the good of souls, the souls who are the subjects of the ministry of that pastor, from the viewpoint of the bishop's responsibility zealously to provide for the *cura animarum*. This would be the meaning, even if it were only for the promptness with which one could transact a decree of removal in comparison with the *iter* of the criminal trial. In principle, this already justified the beginning of the procedure before or during the furtherance of the criminal process. Among other considerations, this was the reason why the case about the inefficacy or harm to the parochial ministry could continue even in the case where the sentence of the criminal process had resulted in an acquittal.

2. Cf. T. GARCÍA BARBERENA, in *Comentarios al Código de Derecho Canónico*, vol. IV (Madrid 1964), p. 122.

1741 Causae, ob quas parochus a sua paroecia legitime amoveri potest, hae praesertim sunt:

1° modus agendi qui ecclesiasticae communioni grave detrimentum vel perturbationem afferat;

2° imperitia aut permanens mentis vel corporis infirmitas, quae parochum suis muneribus utiliter obeundis imparem reddunt;

3° bonae existimationis amissio penes probos et graves paroecianos vel aversio in parochum, quae praevideantur non brevi cessaturae;

4° gravis neglectus vel violatio officiorum paroecialium quae post monitionem persistat

5° mala rerum temporalium administratio cum gravi Ecclesiae damno, quoties huic malo aliud remedium afferi nequeat.

The reasons for which a parish priest can lawfully be removed from his parish are principally:

1° a manner of acting which causes grave harm or disturbance to ecclesiastical communion;

2° ineptitude or permanent illness of mind or body, which makes the parish priest unequal to the task of fulfilling his duties satisfactorily;

3° the loss of the parish priest's good name among upright and serious-minded parishioners, or aversion to him, when it can be foreseen that these factors will not quickly come to an end;

4° grave neglect or violation of parochial duties, which persists after a warning;

5° bad administration of temporal goods with grave harm to the Church, when no other remedy can be found to eliminate this harm.

SOURCES: cc. 2147 § 2, 2157 § 1; *CD* 31; *ES* I, 20 § 1

CROSS REFERENCES: cc. 139, 194, 519, 528–535, 757, 760, 776–777, 911, 958, 1740

COMMENTARY

Ángel Marzoa

I. Meaning of the enumeration of causes

The reasons for which a pastor can be legitimately removed from office, in accord with c. 1740, must be of such a nature that they transform his ministry into something harmful or at least ineffectual. Canon 193 (which regulates removal from office in general) demands "serious reasons" for the removal if the office was conferred for either a definite or indefinite time (§ 1), when one tries to remove the titleholder before his prearranged term of office has ended (§ 2).

The criterion for determining the seriousness of that reason is established in c. 1740: the harm or ineffectiveness of the parochial ministry. Canon 1741 tries to direct itself to the main "reasons for which the pastor can be legitimately removed." In fact, the legislator offers a classification of groups of reasons that can be most general, such as "his way of acting," "unskillfulness or illness," "loss of good name," and "negligence or infraction of duties". None of these can be invoked directly in the case of removal. It will have to be determined in which area his lack of skillfulness is shown, what type of lack of skill or sickness is present, and what repercussion each of these has and what areas of his personal life brought about the loss of his good reputation. Only the last one (5°) can directly be cited, by means being sufficiently singled out.

Within this classification of reasons, which is not exhaustive, there appears anew in numbers 1°, 4° and 5° a reference to the seriousness ("serious detriment," "grave negligence or transgression," "serious harm," "because of bad administration"). Regarding the general need for the seriousness of c. 193, one is not dealing with an extravagance in the legal text. Rather, it appears that the legislator establishes a type of distinction, among the types of reasons, which will reflect upon the way in conducting proceedings, depending on the manner in which one treats of the following:

a) the reasons that, when their material seriousness has been proved, through them themselves and without any other type of investigation being necessary, are automatically considered as bringing about the stipulated harm and inefficacy (as with numbers 1°,4° and 5°);

b) other reasons, which do not of themselves carry that negative consequence for the exercise of the ministry. Therefore, in these instances, there will have to be an evaluation in each case upon the effect (in addition to those indicated in numbers 1°,4° and 5° when they do not take on an evident material harmfulness, and also those in numbers 2° and 3°).

Together with the reasons expressly referred to in the canon, since their enumeration is not especially exhaustive, any other cause that could take place in the concrete case of the harmfulness or the ineffectiveness of the ministry must also be considered valid (that is to say, it causes a serious harm to the *bonum animarum*). To the extent to which this canon partially reproduces the contents of c. 2147 § 2 of the *CIC*/1917, it and the commentaries of the doctrine in respect to it, though derogated, can be a good reference for singling out other reasons that were not now expressly enumerated.

The design of the administrative removal is contained within the obligation of the bishop to watch over the *bonum animarum*. Thus, the procedure for removal can neither be based on the presumption of delictual activity nor on any other reason, which, rooted in a judgment of culpability of the pastor, could give rise to an administrative sanction ("even without the fault of the party concerned," says c. 1740). If there is additional blame, other actions could be taken, but the removal *qua talis* prescinds from this evaluation, and the projection is based solely upon the efficacy of the ministry of the pastor, in immediate relationship with the good of souls.

In any case, both the expressly enumerated causes for removal, and other ones that could be called upon, must exist in the measure according to which the relationship of causality with the harm to souls has been established. The text of c. 519 must be held as a mark of reference.

II. TYPES OF REASONS

1. *Grave detriment to or disturbance of ecclesiastical communion*

One is treating a "new" reason, if one uses the reference of *CIC*/1917 (cf. c. 2147), in conceptual harmony with the conciliar documents of Vatican II. Nevertheless, it must be interpreted in a strictly juridical sense, since it is the basis upon which the reason appears, and the commentary must seek clues for its adaptability. Canon 519 establishes the duty that the pastor, in the community that has been entrusted to him, "fulfill the functions of teaching, sanctifying and ruling." This triple dimension of the *munus* has an evident parallel with the three bonds of full communion established in c. 205. This full communion is the union with Christ within the visible structure of the church, "through the bonds of the profession of faith, of the sacraments and of the ecclesiastical way of life" (see commentary on c. 205). This must be a fundamental reference point for evaluating the level of harm to or disturbance of the *communio*. There would

be a treatment of the attitudes and conduct in those who would not fulfill that mandate of *Christus Dominus*, 30, 2: namely, that "in the exercise of the care of souls, the pastors ... have to fulfill their duty of teaching, sanctifying and governing in such a way that the faithful and the parochial communities feel themselves actual members both of the diocese and of the universal Church."

a) That person could not, actually, fulfill the *munus docendi* (cf. especially c. 528 § 1), having been ordained so that the faithful "rooted in faith, hope and charity, may grow in Christ" (*PO*, 30, 2), when that person is not united to Christ within the structure of the Church through the bond of the *communio fidei*. Thus, one who is not making it his own practice, cannot, on his part, "propose integrally and faithfully the mystery of Christ ... a mystery which must be based upon Sacred Scripture, Tradition, the liturgy, the magisterium and upon the life of the Church" (c. 760; cf. cc. 776–777).

b) On his part, the fulfillment of the *munus sanctificandi* will help the pastors to bring it about that "the celebration of the Eucharistic Sacrifice is the center and culmination of the entire life of the community." This is why the faithful are nourished with spiritual food by means of the devout and frequent reception of the sacraments and through the conscious and active participation in the liturgy. The pastors should also remember that the sacrament of penance extraordinarily contributes to the Christian life. Therefore, pastors should make themselves available to hear the confessions of the faithful (*PO*, 30, 2; cf. cc. 527–530, for the duties of pastors in relation to administration of the sacraments). They shall have to keep in mind all these elements to evaluate whether the exercise of the pastoral ministry is truly inserted within the visible structure of the Church through the bond of the *communio sacramentorum*.

c) Finally, the fulfillment of the *munus regendi* makes it necessary to have an explicitly personal bond of the ecclesiastical regime. What this will demand of pastors is a continual realization that they are "principally cooperators of the bishop," under whose authority "there has been entrusted to him, as to proper pastors, the care of souls" (*PO*, 30). Consequently, everything that would question his union with the visible structure of the Church through the bond of the *communio regiminis (seu disciplinae)* would bring with it a detriment or disturbance of the ecclesiastical communion. In another shade of meaning, this would include situations flowing from the harm and disturbance of the fellowship which are not strictly juridical injuries to the bonds of communion, but which pertain to habitual reproachable behavior from the viewpoint of the affective communion (to sow discord, to be authoritarian, inflexible or intolerant, to make groups and to divide, to try to impose personal opinions, etc.).

In any of these cases, it seems suitable to insist that one is not trying to judge the culpability of the pastor: one is treating a question of fact that does not enter into the question of imputability. It would be different if

those patterns of behavior were constitutive of imputability and consequently sanctionable assumptions *in addition.* However, this is not the object of the procedure of removal.

2. *Ineptitude, permanent illness of mind or of body*

Two identical reasons for those hindrances contemplated in the *CIC*/1917 (c. 2147 § 2, 1°) are under discussion. No mention is made of the possibility of naming an "auxiliary vicar" who would suggest the former codal precept as a preferable measure, perhaps —as L. de Echeverría points out— while harvesting his negative experience from the difficulties that can be derived from this solution.[1] Yet, it is certain that c. 539 considers the possibility of naming an auxiliary vicar where the pastor is impeded in the exercise of his pastoral function through incapacity or infirmity.

In every case, one has to keep in mind that one is not dealing with reasons that automatically bind the bishop to proceed to removal. The legislator wanted to explain some assumptions that could justify removal, leaving aside the question of other possible options left to the prudent judgment of the diocesan bishop. The provision that the bishop has, in naming a parochial administrator beforehand or for an indefinite time —an action by nature a temporary substitute for the function of pastor, c. 539— including it as an alternative to removal, is something that falls within his prudent judgment (cf. c. 1742 § 1). In every case, he will have to arrive at this measure in the situation of a pending recourse against the decree of removal (cf. c. 1747 § 3).

Here, on the other hand, is the treatment of two naturally distinct reasons that must be separately analyzed.

a) *Ineptitude*

By reason of the express mention in the Decree *Maxima cura*,[2] and despite the fact that it was not incorporated in c. 2147 of the *CIC*/1917, the doctrine was still understood after the first codification for the argument of "ignorance" as a type of unskillfulness or at least as a possible cause for it. However, it is not taken into account that the pastor has been ordained, and that the office of pastor has been conferred upon him, presupposing sufficient knowledge from his previous formation. A different matter would be the omission of due diligence in his permanent formation, but this would extend the question into whether he has not fulfilled the proper duties of the priest (cf. n. 4°), though qualified as such through his specific

1. L. DE ECHEVERRÍA, commentary on c. 1741, in *CIC Salamanca*.
2. SCCong, Decr. *Maxima Cura*, August 20, 1910, in *AAS* 2 (1910), pp. 636–648.

pastoral appointment. In this same line of thought, his failure in his explanation of doctrine could not be considered ignorance. In his case, his erroneous teaching goes back to the primary reason of them all, namely, the kind of deterioration of the *communio fidei.*

Unskillfulness is the lack of practical wisdom, of pastoral expertise, of *arte* —we are speaking of the *ars artium*— or of common sense, the habitual lack of tact for what is proper to the *cura animarum* by the pastor: the beneficial discharge of the parochial functions. It is not easy to be more specific: the decision of the legislator in this sense seems prudent, taking into consideration the relationship of this qualification relative to the variables of place, time and other circumstances of the parish. One cannot translate *impericia* as a simple lack of experience, a defect that can be overcome only with experience.

The context must lead to a tracing of the outlines of this cause —as occurs in all those causes of the canon— as an informed circumstance during the exercise of his parochial ministry (excluding ignorance, inexperience, etc., which are objectifiable before the nomination). Contingent reasons that do not determine the "incapacity" about which the canon speaks must be excluded. The term "incapable" obliges one to think about determining reasons for the habitual unskillfulness, even though it is proved irremediable in view of the characteristics of the parish, or even absolute, which would effect other parochial nomination.

b) *Permanent illness of mind or body*

Evidently, a transitory situation (an assumption for which c. 539 provided in the last point of the nomination of a parochial administrator) is not considered, and one must always keep in mind the possibility of his gainfully fulfilling his parochial duties. This seems to be the decisive matter. One is dealing with an especially delicate assumption, and any enumeration must be avoided, especially in what refers to physical ailments. If any of those would objectively make the beneficial fulfillment of the parish function impossible, without a doubt the legislator would expressly let this be known. Rather, with the prudent judgment of the diocesan bishop, there must be a broadening of the evaluation (of the concrete case in concrete circumstances) so as "not to forget" —as García Barberena points out very correctly— "that it would be against natural equity to afflict with distress a good but ailing pastor" without a true necessity.[3] Moreover, there should be an evaluation of the benefits that the priest's ailment could, in some cases, bring to the parochial community.

3. T. GARCÍA BARBERENA, in *Comentarios al Código de Derecho Canónico*, vol. IV (Madrid 1964), p. 124.

3. *Loss of good reputation or aversion for the pastor*

Once again, it is essential to emphasize that the rationale for these causes to be considered reasons for the removal is the good of souls, not a reproof of the behavior of the pastor who cannot be responsible that these circumstances came about. Therefore, one is dealing with investigating the facts not to "rebuke" the pastor, but simply to show the existence of reasons —absolute or relative, objective or subjective— because of which the exercise of the ministry on the part of the determined titular of the parochial office turns out to be less effective or even counterproductive. The two reasons must not be based on an episodic state of affairs. It has to be foreseen that the loss of the good reputation or the aversion "will not stop soon."

The accuracy that the norm makes in respect to the loss of good reputation is very important: "in the eyes of the honest and prudent faithful." In this way, it deals with avoiding the possibility of actions directed to diminish the reputation of the pastor, actions originated on the part of persons or groups motivated by less than noble intentions.

However, the reason or the reasons for that loss of good name, as did c. 2147 § 2, 3° of *CIC*/1917 are not defined exactly. What is thought of as a possible reason for removal is a reality that, in itself, whatever its origin, nature or justification may be, damages or at least makes ineffective the ministry of the pastor. Think, for example, of the reputation for indiscretion, in the suspicion —even though it is unsubstantiated— of misappropriation of parochial assets; or of the disclosure of an old deviant action —even a criminal deed, but already punished and for which amendment had been made— that now is made public. Think of the loss of reputation coming from disorderly conduct due to something alleged or due to imprudent behavior —perhaps only stemming from naiveté or flippancy—of one's own pastor, etc. What the bishop must evaluate is in what measure the loss of one's good reputation, no matter what its origin, could cause harm to the profitable exercise of his ministry. Let this serve as a criterion —namely, the broadening of the situation by using the proper functions of the *tria munera*— there is the pronouncement of St. Gregory the Great: "when the conduct of one is scorned, so too is his preaching."[4] Nor does it have to be said, for the rest, that, on occasions when the reputation of the parish priest is in question without a reason, or with a maliciously manipulated reason, the adequate action is not removal, but carrying out what is necessary to make the bad opinion that has been unjustly spread to "cease immediately." Rehabilitating the reputation of the pastor in the eyes of the honest and prudent faithful does this.

4. S. GREGORIO MAGNO, *Homil.* 22: ML 76, 1119; cit. by T. GARCÍA BARBERENA, in *Commentaries*... cit., p. 126, note 18.

The detail "against the pastor" which the text states extends the hypothesis to the person of the priest. Therefore, there must be excluded those reactions of aversion which could have been provoked through the proper and correct exercise of the parochial ministry, or coming about through the presence of the pastoral activity of the church in a determined place, etc., and which extend beyond the concrete person who in this case is the titular of the office. Moreover, the intense dislike can come from very different causes, for which the pastor can be culpable (imprudent way of acting, very excitable character, etc.), but one always has to keep in mind that the determining matter is not that culpability, but its negative effect upon the exercise of parochial ministry. It is worthwhile to emphasize that in place of the expression *odium plebis*, of the *CIC*/1917 (c. 2147 § 2, 2°), the milder term "aversion," is used. In this way, the situation embraces a greater number of suppositions of possible incompatibility between the pastor and the community entrusted to him.

4. *Grave neglect or violation of parochial duties*

Although, for the effects of the removal it does not count that there is serious fault on the part of the party concerned, yet, it does count once one establishes as a possible cause the *serious negligence or transgression of his parochial duties*. The verified fact of a grave negligence or transgression in the fulfillment of those duties should constitute a sufficient reason to proceed to the removal, without a need, therefore, of making a judgment of culpability. A demonstrated relationship must be deduced from the canons that establish the duties of the priests (cc. 73ff), and those that refer to the principal functions of the pastor (cc. 519ff), but always from the perspective of evaluating up to what point that transgression or negligence can influence the correct and profitable carrying out of parish ministry.

The need for a previous *admonition* that was ignored does not bring penalties with this case. Rather, there appears to be a measure of prudence on the part of the legislator for the purpose of avoiding precipitous action by the authority before what could have been lapses and isolated breaches, or even matters of lack of attention, the recognition and correction of which would be sufficient for not impairing the fruitful fulfillment of the parochial ministry (not the qualitative difference between this possible cause of removal and the procedure "against the negligent pastor in the fulfillment of his parochial duties" which the *CIC*/1917 contains, cc. 2182–2185).

5. *Bad administration of temporal goods*

The *bad administration* of the temporal goods of the Church is the last of the causes that are enumerated, and the most specific of all of them. In fact, it could be reduced to a species of the type of causes in n. 4°. However, as L. de Echeverría pointed out, its being considered separately must be because "experience teaches that a zealous pastor, though good and perfect, can be a bad administrator."[5] For this reason, the canon prefers to treat this case in a distinct number, in order to be able to state exactly —differently from the causes of the previous number— that before the removal the possibility of remedying this evil by means of other measures must be considered. In this sense, the possibility of entrusting the administration of the assets to another person will have to be evaluated, a more direct accounting on the part of the diocesan treasurer, greater restrictions upon the capacity of the pastor of having at his disposal those that are the ordinary faculties of the pastor, etc.

5. L. DE ECHEVERRÍA, commentary on c. 1741, cit.

1742 **§ 1. Si ex instructione peracta constiterit adesse causam de qua in can. 1740, Episcopus rem discutiat cum duobus parochis e coetu ad hoc stabiliter a consilio presbyterali, Episcopo proponente, selectis; quod si exinde censeat ad amotionem esse deveniendum, causa et argumentis ad validitatem indicatis, parocho paterne suadeat ut intra tempus quindecim dierum renuntiet.**

§ 2. De parochis qui sunt sodales instituti religiosi aut societatis vitae apostolicae, servetur praescriptum can. 682 § 2.

§ 1. If an investigation shows that there exists a reason mentioned in Can. 1740, the Bishop is to discuss the matter with two parish priests chosen from a group stably established for this purpose by the council of priests at the proposal of the Bishop. If he then believes that he should proceed with the removal, the Bishop must, for validity, indicate to the parish priest the reason and the arguments, and persuade him in a fatherly manner to resign his parish within fifteen days.

§ 2. For parish priests who are members of a religious institute or a society of apostolic life, the provision of Can. 682 § 2 is to be observed.

SOURCES: § 1: cc. 2148, 2158
§ 2: c. 2157 § 2

CROSS REFERENCES: cc. 731, 1740, 1741

COMMENTARY

Ángel Marzoa

1. *The investigation*

The inquiry (or instruction; the Latin text uses the same term which c. 1428 does) concerns the initiative of the diocesan bishop. However the circumstances that justify it come to his knowledge, it is he who must determine its inception, a step that he might accomplish personally or by means of another person. Through a reasonable analogy, c.1717 could inspire this phase, when it is correctly understood that it is not undertaking to prove criminal imputability, but to assess the elements of justice needed. Thus, the bishop can verify "the existence of one of the causes indicated in c. 1740." This is understood, in accordance with c. 1740 that, in

speaking of the "bishop," the precept refers to the diocesan bishop, with the restrictions that that assumes (see commentary on c. 1740).

The *cause de qua* in c. 1740, to which an allusion is made, is anything that, even without a serious culpability, originates in a deficient or even a detrimental parochial ministry (see commentary on c. 1740). The most important ones are enumerated in c. 1741 (see commentary).

2. *The parochial assessors*

One assumes that the bishop will have already proposed to the presbyteral council the designation of the stable group of pastors with the commitment to render an assessment regarding this question. That is a perceptive commitment, since the legislator has wanted to distinguish this "stable group" from the "college of consultors," whose members are freely named by the bishop from among the members of the presbyteral council (cf. c. 502). Here one is dealing with a group of pastors who, at the proposal of the bishop, the presbyteral council itself designates. By nature, it has a consultative function. In view of the way it is constituted (it is set up by the presbyteral council, the members of which have been chosen by the diocesan clergy), it can be said that the legislator by precept wants to have the bishop advised by two pastors who have received the confidence of their own presbyterate in discharging this delicate mission.

The number of this group is not determined (of course, more than two, according to the tone of the canon: *cum duobus...*, *e coetu*). It does not establish a determined order for participation in this situation. Since this advisory function is preceptive —that which has importance for the legitimacy of the eventual decree— and in the lack of other requirements, the bishop will be able freely to call upon two of the pastors belonging to this group, and to ask their advice in view of the inquiry.

3. *The formation of a decision on the part of the Bishop*

After the two pastors approve the consultation, the proper bishop decides whether to proceed to removal. In an affirmative case, the legislator establishes a succession of preceptive actions. There is a distinction to make with regard to the steps that must be followed:

a) As is obvious, before beginning the inquiry, nothing prevents the bishop from interviewing the pastor and advising him to resign his assignment. However, this moment is not procedural; therefore, it does not specify an exhaustive indication of causes and arguments. Evidently, the voluntary renunciation on the part of the pastor will avoid the entire subsequent process.

b) It is a different matter when the inquiry is made, and, after the perceptive consultation with the two pastors, he decides to proceed with the removal. The bishop must not proceed without more to the publication of the decree, but he will paternally counsel the pastor to resign, fixing the deadline of fifteen days. This is now a procedural step, and it is presumed to be necessary for the issuance of the decree (cf. c. 1744). It does not appear that the bishop has the obligation to provide the pastor with an examination of the inquiry (this is preceptive, in accordance with c. 1745, beginning from the issuance of the decree of removal). Nevertheless, since "it is necessary that he indicate the cause and the arguments," for the invitation to the resignation to have validity as a necessary procedural step, he will at least explain it in a summary fashion, either in a written communication or in a way that there can be drawn up the acts of the invitation and of the indication of the cause and of the arguments.

Since the action of the two pastoral counselors is within the scope of the consultative function, the terms of their vote hold as their exclusive consignee the bishop: they form a part of the internal elements (though non-binding) for the formation of his decision. However, in order to be a necessary step for the legitimacy of the later decree, some proof must remain about what the consultation produced. This can be accomplished by means of an act of the notary (cf. cc. 484ff) that will have to form part of the inquiry, with proof from the two pastors who have been called upon to give their advice.

The interview of the concerned party cannot be limited simply to hearing him in the moment of communicating the decision. The interview has the aim of being able to give the concerned party the opportunity for a counter-argument to the grounds for the decision of the bishop. He must be given a prudent period of time so that he can prepare an eventual response; the legislator establishes a minimum time limit of fifteen days. If the pastor decides to present his resignation willingly (cf. c. 1742) during the expiry of this time period, it will end the procedure (see commentary on c. 1743).

4. *Removal of parish priests who are members of a religious institute or a society of apostolic life*

The situation of a pastor who is a member of a religious institute or of a society of the apostolic life is not contained within this procedure. The reference which is made to c. 682 § 2 is sufficiently explanatory in showing that these situations have their own regime, a reference which the present canon does nothing more than confirm. In fact, the text referred to is *amoveri potest ad nutum sive auctoritatis committentis..., sive superioris* (see commentary on cc. 538 § 2 and 682).

1743 Renuntiatio a parocho fieri potest non solum pure et simpliciter, sed etiam sub condicione, dummodo haec ab Episcopo legitime acceptari possit et reapse acceptetur.

The resignation of the parish priest can be given not only purely and simply, but even upon a condition, provided the condition is one that the Bishop can lawfully accept and does in fact accept.

SOURCES: c. 2150 § 3; Cod Com Resp., 20 maii 1923 (*AAS* 16 [1924] 116)

CROSS REFERENCES: cc. 39, 184, 187–189, 538 § 1, 1742

COMMENTARY

Ángel Marzoa

Voluntary resignation of a parish priest

Resignation is one of the causes for the loss of office (cf.see commentaries on cc. 184, 187–189). In reference to the parochial office, resignation is explicitly treated in c. 538, which notes that it is a type of resignation which, "for its validity, *must be accepted* by the bishop" (c. 538 § 1).

Consequently, in the case this canon references, the vacancy of the office will come through the acceptance of the resignation itself, not through a decree of removal, which is a different case (cf. cc. 192–196). Although this canon is within the chapter that regulates the procedure of removal, when the renunciation is made, the procedure is interrupted and the process that leads to the vacating of the office regains its normal course, as regulated in c. 538.

The canon addresses the two possibilities that introduce a variant in the determination of the precise moment when an office is vacated through renunciation:

a) If one is treating a simple resignation, made *secundum legem* (made in writing or orally before two witnesses, c. 189 § 1), as an answer to an invitation received, its effect is produced the moment it is formally accepted by the bishop (within the time period of three months: c. 189 § 3; cf. c. 189 § 4). All the relevant material will be duly put into the archives.

b) If the resignation is conditional, the acceptance of the condition will have to be expressly evident in the act of acceptance of the resignation. Moreover, the efficacy of the resignation will depend on the fulfillment of the condition (for example, a nomination for another office). Meanwhile, this means that the granting of the office *a quo* cannot be provided, since it is not vacant, and that, as long as the condition is not fulfilled, the act of resignation can be revoked by the one who is making his resignation (c. 189 § 4).

1744 **§ 1. Si parochus intra praestitutos dies non responderit, Episcopus iteret invitationem prorogando tempus utile ad respondendum.**

§ 2. Si Episcopo constiterit parochum alteram invitationem recepisse, non autem respondisse etsi nullo impedimento detentum, aut si parochus renuntiationem nullis adductis motivis recuset, Episcopus decretum amotionis ferat.

§ 1. If the parish priest has not replied within the days prescribed, the Bishop is to renew his invitation and extend the canonical time within which a reply is to be made.

§ 2. If it is clear to the Bishop that the parish priest has received this second invitation but has not replied, even though not prevented from doing so by any impediment, or if the parish priest refuses to resign and gives no reasons for this, the Bishop is to issue a decree of removal.

SOURCES: c. 2149

CROSS REFERENCES: cc. 200–203, 1742–1743

COMMENTARY

Ángel Marzoa

1. *A final attempt at conciliation*

Canon 1743 contemplates the hypothesis that, as a consequence of the "paternal advice" established in c. 1742, the removal process is suspended by a voluntary renunciation on the part of the holder of the title.

Upon being advised, the pastor is given fifteen days to voluntary resign. Nevertheless, the legislator wants to exhaust the possibilities by a final attempt to resolve the situation through a more conciliatory way: a way that "if the pastor does not respond within the time limit of fifteen days," the bishop cannot proceed to issue the decree of removal at once, but he will have to repeat his invitation, extending the useful time limit to respond. The duration of the time limit is not indicated, as in the case of the first invitation. Instead, the legislator leaves this to the discernment of the bishop, who will have to establish a reasonable time for the pastor to respond.

If the pastor assents to offering his resignation in response to this second request, the situation goes back to what was established in c. 1743.

2. *The decree of removal*

After the bishop repeats his invitation for resignation, the issuance of the decree of removal must fulfill the following conditions:

a) the second deadline has expired —which is pointed out in the second invitation— and the pastor has not assented to the invitation to resign, provided that the bishop has proof that the party concerned has received the second communication and could have replied (to accomplish this, the bishop will have to carry out the invitation through means that permit him to be assured of its receipt);

or b) that the party concerned does answer before the expiration of the time limit, refusing the invitation to resign, but without any reason (if there are allegations, whether convincing or not, we shall then be, on the other hand, before the supposition of c. 1745). In this case, it is not necessary to wait for the time limit expressly indicated in the second invitation.

Having met one of these two requirements, the bishop must proceed to issue the decree of removal without delay. The law considers it already sufficiently certain that the pastor —given his explicit refusal or his voluntary silence without an explanation or any allegation— does not have the frame of mind to cooperate in reaching a solution while on the verge the process of removal. It would not be reasonable —the welfare of souls is at stake— to take on more delays without the hope of a positive outcome.

The decree of removal would put an end to the process. The only course that remains open for the removed party is hierarchic recourse, in accord with cc. 1732–1739.

3. *Continuation of the process of conciliation*

The canon contemplates two possibilities that would extend the conciliatory process before the issuance of the decree of removal:

a) That the pastor claims that, owing to some impediment, he has not responded within the time limit; or that it comes to the attention of the bishop that that has been the reason for the lack of a response. This being so (once the consistency of the alleged impediment has been analyzed: sickness, for example), the bishop must make an accommodation in an equitable way in such a way so that the efficacy of the time limit is conditioned upon the actual possibility of a response on the part of the party concerned.

b) That the pastor responds, pleading some motive for not accepting the resignation. In that case, there are three possibilities:

— if one is treating motives or reasons put forward for consideration by the bishop, but which have little or no bearing in the discussion of the grounds for the alleged reason for the removal that would give rise to deliberation on the part of the authority and to a new decision. Think, for example, of the allegation of a terminal illness of the party concerned or of an especially hypersensitive situation that would be aggravated by the publicity of the decree, etc.

— if in answering the reason for removal or the reasons that give it foundation, the motives or proofs of the pastor turn out to be convincing to the bishop, the bishop can allow his decision to proceed to the removal to be without effect, by sending the investigation to the archives. Thus, for example, if a manifest calumny were to be discovered and which can be proved; or there is a "challenge" through weighty motives as presented by the consultant pastors; their convincing proof that that moral injury or ineffectiveness of the ministry about which c. 1740 spoke, did not happen; etc.

— if the reasons pointed out to challenge the cause for removal or his reasons seem insufficient to the bishop, we would not be within the conciliatory route, but it would produce, the transition to the following stage of procedure, as regulated in c. 1745.

1745 **Si vero parochus causam adductam eiusque rationes oppugnet, motiva allegans quae insufficientia Episcopo videantur, hic ut valide agat:**

1° invitet illum ut, inspectis actis, suas impugnationes in relatione scripta colligat, immo probationes in contrarium, si quas habeat, afferat;

2° deinde, completa, si opus sit, instructione, una cum iisdem parochis de quibus in can. 1742 § 1, nisi alii propter illorum impossibilitatem sint designandi, rem perpendat;

3° tandem statuat utrum parochus sit amovendus necne, et mox decretum de re ferat.

If, however, the parish priest opposes the case put forward and the reasons given in it, but advances arguments that seem to the Bishop to be insufficient, to act validly the Bishop must:

1° invite him to inspect the acts of the case and put together the objections in a written answer, indeed to produce contrary proofs if he has any;

2° after this, complete the instruction of the case, if this is necessary, and weigh the matter with the same parish priests mentioned in Can. 1742 § 1, unless, because of some impossibility on their part, others are to be designated;

3° finally, decide whether or not the parish priest is to be removed, and without delay issue the appropriate decree.

SOURCES: cc. 2159–2161

CROSS REFERENCES: cc. 221, 223, 1732–1739, 1742, 1744

COMMENTARY

Ángel Marzoa

The process of making objections to the removal

If the pastor challenges the case and the reasons given in the bishop's invitation to resign (cf. c. 1742), and the bishop considers the grounds of the challenge to be tenable and sufficient, he must suspend the procedure and send the investigation to the archives (see commentary on c. 1744).

However, even if the bishop does not consider the grounds sufficient, he cannot proceed to the valid issuance of the decree, because at this moment the procedure abandons the conciliatory route, and "the case becomes *in contradictorio*, and must be processed with the arguments and evidence supplied by the interested party."[1] Following this new development, the steps of the process which had been presented over the course of the procedure, but which had not been directed toward securing a solution different from the removal, must take place. This is required to issue the decree legitimately. They are as follows:

1) To facilitate the pastor's prompt examination of the investigation so he can present his challenges in writing and bring out any proofs to the contrary. Here he will necessarily have to get the record of the investigation itself —it is not sufficient to let him know orally or through a written description of the reason and the arguments, as in the case of c. 1742— in such a form that two formalities are taken care of with this step: a) to offer the pastor a new opportunity to resign, in view of the data in the investigation; b) to enforce what c. 50 stresses: namely, the interview of the party concerned. It is the moment in which the pastor appears in person in the procedure; consequently, he must have at his disposal all the necessary elements for his provisional defense or later recourse.

2) In view of the challenges and proofs presented, if these were clearly satisfactory, the bishop will consider the procedure concluded, and will put the investigation into the archives. But if it had been necessary to carry out new actions to prove the sufficiency or the non-sufficiency of the allegations, he will have to sufficiently complete the investigation, and he must study once again the matter with the pastors with whom he had already carried out the first consultation (cf. c. 1742 § 1). If it is not possible to consult with any one of these (without excluding the effectiveness of the possible challenge made by the prosecuted pastor), he would have to designate others, also taken from the same *coetus* to which c. 1742 § 1 refers.

3) Finally, it will be decided whether the pastor must be removed. In the circumstance of an affirmative decision, the bishop will immediately issue the decree of removal. In the circumstance of a negative decision, and despite the indication expressed in n. 3° (*decreto pertinente*), the step of putting the investigation into the archives the investigation can be sufficient with the notification of the party concerned regarding the contents of the resolution —as Labandeira affirms with good reason.[2]

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1. E. LABANDEIRA, commentary on c. 1745, in *CIC Pamplona*.
2. Cf. ibid.

1746 **Amoto parocho, Episcopus consulat sive assignatione alius officii, si ad hoc idoneus sit, sive pensione, prout casus ferat et adiuncta permittant.**

When the parish priest has been removed, the Bishop is to ensure that he either is assigned to another office, if he is suitable for one, or is given a pension insofar as the case requires this and the circumstances permit.

SOURCES: c. 2154

CROSS REFERENCES: cc. 195, 281, 1350, 1747

COMMENTARY

Ángel Marzoa

Measures following the removal

"The Bishops ... must make sure ... that they establish norms for what has to be provided for the decent sustenance of those who have been or had been discharging some duty in the service of the People of God" (*PO*, 20). Thus, even in the case of removal from office because of a delict, "care must always be given so that [the clergy] do not lack what is necessary for a decent sustenance" (c. 1350 § 1).

With greater reason and in the fulfillment of the general mandate of c. 195, which, together with c. 281 formalizes the needs of the cited conciliar text, c. 1746, based on the supposed issuance of the decree of removal, urges the bishop to provide the necessities of the pastor who has been removed, suggesting two ways of carrying out this measure, "according to how the case recommends itself [in view of the reason for the removal] and according as circumstances permit":

a) There is a difference from what takes place in c. 1350, where the ground is penal and therefore the person is charged with an imputable delict. Here, the supposition does not prejudge the culpability of the holder of the office, but directly relates to the need of promoting the good of souls. For that need, once he has considered that the causes on account of which the ministry has turned out to be ineffective or even detrimental might be relative, the bishop can entrust another office to him. However, because of the distinction of this procedure from that of the transfer (cc. 1748ff), the situation makes one think of a nomination for an office different from that of pastor.

b) In the case where the previous solution might not be viable, for example, when the cause of the ineffectiveness or the harm from his ministry has its roots in the person himself —although, obviously, without implying a judgment of personal culpability— and could therefore affect the carrying out of any other office, the awarding of a pension must be provided.

In any case, the administration of the Church must take care of the general interests by removing the pastor from his actual office, but without omitting the needs of fairness, as is the duty of the administration. It must be emphasized that here one is not treating an exercise of charity, as in the case of c. 1350 § 2: *Ordinarius meliore quo fieri potest modo providere curet.* In every situation, this provision is upheld to a degree that is more demanding than § 1 of the cited canon (*semper cavendum est...*). This canon establishes without exception that the bishop must proceed (*consulat*) to a new nomination for another office or to the assignment of a pension (the reading of the Spanish translation: "to provide for the necessities..." is a broadening *ad sensum* of what logically follows from c. 281 § 1 and which perhaps would not be necessary). Here there is no treatment of the exercise of charity, but it follows from "justice in the concrete case and for the individual person."[1]

1. E. LABANDEIRA, commentary on c. 1746, in *CIC Pamplona*.

1747 **§ 1. Parochus amotus debet a parochi munere exercendo abstinere, quam primum liberam relinquere paroecialem domum, et omnia quae ad paroeciam pertinent ei tradere, cui Episcopus paroeciam commiserit.**

§ 2. Si autem de infirmo agatur, qui e paroeciali domo sine incommodo nequeat alio transferri, Episcopus eidem relinquat eius usum etiam exclusivum, eadem necessitate durante.

§ 3. Pendente recursu adversus amotionis decretum, Episcopus non potest novum parochum nominare, sed per administratorem paroecialem interim provideat.

§ 1. A parish priest who has been removed must abstain from exercising the function of a parish priest, leave the parochial house free as soon as possible, and hand over everything pertaining to the parish to the person to whom the Bishop has entrusted it.

§ 2. If, however, it is a question of a sick man who cannot be transferred elsewhere from the parochial house without inconvenience, the Bishop is to leave him the use, even the exclusive use, of the parochial house for as long as this necessity lasts.

§ 3. While recourse against a decree of removal is pending, the Bishop cannot appoint a new parish priest, but is to make provision in the meantime by way of a parochial administrator.

SOURCES: § 1: c.2156
§ 2: c.2156
§ 3: c. 2146 § 3; Signatura Decisio, 1 nov. 1970; PCIDSVC Resp. III, 1 iul. 1971 (*AAS* 63 [1971] 860)

CROSS REFERENCES: cc. 539, 541, 1381, 1384

COMMENTARY

Ángel Marzoa

Consequences following the decree for removal

This canon treats the juridical management of the temporary situation occurring from the time of the issuance of the decree of removal until its definitive resolution through the appeal or through the expiration of the time limits for challenges.

a) The decree is carried out immediately, even when the pastor who has been removed makes recourse. From this point on, the obligations of the pastor enumerated in § 1 begin. They continue to bind him from the time he receives the decree. The immediate execution, as Labandeira stresses opportunely,[1] is one more proof of the qualitative difference between the decree of removal considered here and the penal decree of privation from office (see commentary on c. 1740), which, in accordance with c. 1353, would remain suspended automatically in the face of recourse.

If the pastor affected by the decree of removal were not to fulfill the duties mentioned in § 1, then there could be an application of cc. 1381 (the delict of illegitimate retention of a post of which he has been deprived) or 1384 (an illegitimate exercise of the sacred ministry).

b) One more proof of the meaning and finality of the decree of removal is the provision made in § 2. As a matter of fact, as a corresponding right to the obligation of residence (cf. c. 533 § 1), the use of the parish house must be joined with the nomination of the pastor. Through this appointment, in principle, the removal brings with it the loss of the use of the parish house. Since the reasons for removal are not based upon elements of culpability, if there exists any serious reasons for which the removed pastor cannot move out of the parish house, the bishop must allow him its use while the necessity perdures.

The text refers in particular to the sickness of the pastor. Nevertheless, it would appear that the bishop must extend this concession for similar circumstances distinct from sickness, including, for example, the sickness of someone living with the pastor. It is not necessary to explain the negative consequences that would come from an inconsiderate action under these circumstances.

c) Although the recourse against the decree does not imply the suspension of its execution, it does prevent a new granting of that pastoral office. In the interim, the bishop must limit himself to the possibility of a parochial administrator (cf. cc. 539–540). Meanwhile, in this instance, the parochial vicar (cf. c. 541) will assume the administration of the parish. The sense of this precaution made by the legislator is obvious; despite the immediate execution of the decree (justified by the seriousness of the cause: c. 1740), the recourse leaves open the possibility of its being reconsidered. Although the pastor has been removed, as long as the decree of removal is not firm and invulnerable, his legitimate expectation of an eventual contrary decision remains viable.

1. E. LABANDEIRA, commentary on c. 1747, in *CIC Pamplona*.

A new appointment to the office before the resolution of the recourse would occasion the risk that, if the recourse is successful, the restoration of the former situation would be very difficult and affect other rights and legitimate expectations. Therefore, this foresight of the legislator, in addition to preventing a build-up of uncertain juridical situations, avoids —as Labandeira points out— the loss of the reputation of the institutions if the decree were to be annulled.[2]

2. Cf. ibid.

CAPUT II
De modo procedendi in traslatione parochorum

CHAPTER II
The Procedure for the Transfer of Parish Priests

1748 **Si bonum animarum vel Ecclesiae necessitas aut utilitas postulet, ut parochus a sua, quam utiliter regit, ad aliam paroeciam aut ad aliud officium transferatur, Episcopus eidem translationem scripto proponat ac suadeat ut pro Dei atque animarum amore consentiat.**

The good of souls or the necessity or advantage of the Church may demand that a parish priest be transferred from his own parish, which he governs satisfactorily, to another parish or another office. In these circumstances, the Bishop is to propose the transfer to him in writing and persuade him to consent, for the love of God and of souls.

SOURCES: c. 2162; *ES* I, 20 § 2

CROSS REFERENCES: cc. 35–38, 134, 145, 184–186, 190–191, 515, 522, 538, 682

1749 **Si parochus consilio ac suasionibus Episcopi obsequi non intendat, rationes in scriptis exponat.**

If the parish priest proposes not to acquiesce in the Bishop's advice and persuasion, he is to give his reasons in writing.

SOURCES: c. 2164

CROSS REFERENCES: cc. 220, 221, 223

COMMENTARY

Ángel Marzoa

1. *The procedure for transfer*

Within section II (see the commentary on the section), after the procedure for the removal of pastors (cc. 1740–1747), chapter II deals with transfer. Transfer has similarities with respect to the previous procedure, since both are inspired and motivated by the *bonum animarum*. However, transfer also has some differences of importance that are worthwhile to point out. Among other effects, there is this consideration: if removal can also be the premise for the naming of a new pastor (not excluded in c. 1746), its reasons will still be subject to the procedure of cc. 1740ff, not the procedure these canons are now considering.

In the case of removal (see commentary on c. 1740), the effects following the procedure or not, the insignificance of the "serious fault of the party concerned" must be expressly evident, even though there could be behavior juridically subject to reproach in itself (cf. c. 1741). What the removal of the pastor as given in c. 1740 pursues in an immediate way is the prevention of the harm or ineffectiveness that has come about because of the exercise of the ministry by the determined title-holder of the parochial office. For that reason, from the viewpoint of causality, there truly does exist a negative connotation.

In contrast, the procedure for transfer (cc. 1748–1752) is inspired by positive motivations. As the proper canon affirms, the reason for the transfer is "the good of souls, the need or the usefulness of the Church." This reason is what considerably expands the range of reasons that could bring the bishop to plan the transfer of a pastor who "presides over" a parish "fruitfully."

Let us also say, in passing, that there exists another "transfer" in the *CIC* (penal transfer) that, save for the use of the same name, does not have the slightest relationship with it. One deals with the expiatory penalty of c. 1336 § 1, 4° (cf. cc. 1717–1728).

2. *The competent authority*

The *competent authority* to effect the transfer is the diocesan bishop (cf. c. 538 in relationship with c. 134 § 3) and those on the same level (the reference of c. 134 § 3 to 381 § 2: see respective commentaries). Consequently, this person cannot be one who has ordinary executive

power, as is the case with the vicar general (unless he receives a special mandate: cf. c. 134).

There is no mention made, as in c. 1742 § 2, of pastors who are members of a religious institute or incardinated in a society of the apostolic life. Since the transfer supposes a new nomination, the action of the bishop must be adhered to without any more steps than those is set down in c. 682 § 1.

3. *Proposing the transfer*

Since they do not deal with the avoidance of harm, but of positively bringing a better good, there is no demand for the carrying out of an investigation prior to making the decision (cf. c. 1742). The bishop formally proposes the transfer in writing, advising that it be accepted out of love for God and for souls.

It is worth the effort to emphasize that this beautiful call to the "love of God and of souls" is not a literary frill. One ought to remember that here resides the greatest and truest motive, exceeding all juridical interest, for the exercise of the ministry. Through this ministry, the priest in the diocese is a cooperator with one who has the pastoral care of a *portio populi Dei* (cf. *CD* 11; c. 369) entrusted to him. Evidently, it is not necessary that this petition consist in the proper writing of the transfer. It seems logical to think of what the text itself looks like: *scripto proponat ac suadeat.* Thus, the norm establishes that, together with the sending of the decree, it should carry some exemplary communication.

If the pastor accepts the proposal of the transfer, the bishop can proceed to issue the decree of the new nomination. However, he has to keep in mind that the one being transferred must learn what remuneration he will receive from his previous office, until such a time as he takes canonical possession of the second office (c. 191 § 2). With his taking possession of the new parish (cf. c. 527 § 3), the departure from the parish *a qua* is effected (c. 191 § 1), unless there is some other instruction from authority.

4. *Reasons adduced by the parish priest against the transfer*

However, it can happen that the pastor, having received the written proposal of the transfer, thinks that he has reasons not to "follow the advice and the exhortations of the bishop." This circumstance introduces a substantially new turn in the procedure. If in a first moment of planning the reason for the transfer —in general for the good of souls— a broad margin of discretion is accorded to the bishop, beginning from the moment of the pastor's dissent, in virtue of what is established in c. 190 § 2,

there is now required a motivation based on a serious reason. The manner of proceeding revolves around this more formal moment, and the procedural steps regulated in the following canons are followed rigorously.

The Spanish translation is expressed in this way: "If the pastor is not disposed to follow the advice..." Although this is not literally contrary to the original text (*Si... consilio et suasionibus Episcopi obsequi non intendat*), it can give the impression that the legislator considers *a priori* the attitude of the pastor in a negative way, as if a lack of good disposition, rebellion, or disobedience were necessarily implied. However, the procedure does not attempt to suggest that the negative answer of the pastor is due to a negative disposition. Nor is the action suspect because of arbitrariness. Simply stated, it is guaranteed, through an only minimally regulated procedure, that both the authority of the bishop and the consideration of the reasons that can assist a pastor do have their adequate place in the final decision. Thus, the expression *consilio ac suasionibus Episcopi obsequi non intendat* must be understood in the light of what follows immediately afterwards: "He should explain in writing the reasons [the motivation and intentionality of these are not prejudged]," while keeping in mind the possibility that the previous canon (see commentary) acknowledges that the bishop can reconsider his decision, or reaffirm it, in view of the presented motives.[1]

In the parallel canon of the *CIC* of 1917 (c. 2164: *Si parochus consilio ac suasionibus... non obsequatur*), the Spanish version is translated more satisfactorily: "If the pastor does not agree..." That is *the fact*: if his reasons are worth heeding it is something that remains for the judgment of the bishop (cf. c. 1750). Thus, one must understand the text in this sense: if the pastor *is not in conformity with the advice and recommendation of his prelate*, he must explain in writing the reasons for his disagreement.

In consequence of what is prescribed in the norms that establish the general management for the transfers (cf. c. 190 § 2), there opens a phase of the procedure which has as its object the analysis of the weight of the reasons the interested party raises. He weighs these reasons in comparison with those that the bishop has for proceeding to the transfer. As previously noted, "if the transfer is done against the will of the holder of the office, a serious reason is required. Keeping in place the right to explain the contrary reasons, the procedure set up by the law must be observed" (c. 190 § 2; see commentary). This procedure is what prevails beginning with c. 1750.

1. It seems to us that the English and French versions better accord with the context of the canon: "If the parish priest proposes not to acquiesce in the Bishop's advice and persuasion" (E. CAPARROS-M. THÉRIAULT, J. THORN (Eds.), *Code of Canon Law Annotated*, Montréal 2004): "Si le curé n'entend pas déférer à l'avis et aux exhortations de l'Évêque..." (E. CAPARROS-M. THÉRIAULT, J. THORN (Dirs.), *Code de Droit Canonique*, Montréal 1999).

1750 Episcopus, si, non obstantibus allatis rationibus, iudicet a proposito non esse recedendum, cum duobus parochis ad normam can. 1742 § 1 selectis, rationes perpendat quae translationi faveant vel obstent; quod si exinde translationem peragendam censeat, paternas exhortationes parocho iteret.

Despite the reasons put forward, the Bishop may judge that he should not withdraw from his proposal. In this case, together with two parish priests chosen in accordance with Can. 1742 § 1, he is to weigh the reasons which favor and those which oppose the transfer. If the Bishop still considers that the transfer should proceed, he is again to renew his fatherly exhortation to the parish priest.

SOURCES: cc. 2165, 2166

CROSS REFERENCES: cc. 190 § 2, 1742, 1748, 1749

COMMENTARY

Ángel Marzoa

1. *Review of the pastor's claims*

Once the bishop has received the written assertions of the pastor (cf. c. 1749) in answer to the written proposal of a transfer (cf. c. 1748), the bishop can consider that the alleged motives have sufficient substance for a reconsideration of his decision for the transfer, and with this he will terminate the matter, communicating this to the pastor. Alternatively, the bishop may determine that the motives presented do not have sufficient weight. In the latter case, the bishop and two pastors[1] will consider the reasons that brought the bishop to decide upon the transfer, the reasons the pastor brings forth in opposition, and the inconveniences that could result from an action contrary to the opinion of the one to be transferred, etc. (*rationes perpendat quae traslationi faveant vel obstent*).

The participation of the two pastors in the examination of the pros and cons of the transfer serve to help the bishop make his decision objective. However, the decision belongs solely to the bishop, given the consultative nature of the *coetus* of pastors designated for these duties.[2] The text

1. For the manner of determining these parish priests, see commentary on c. 1742.
2. See ibid.

sufficiently emphasizes this point: "He will make the examination of the matter with two pastors … and if [the bishop] thinks that the aforementioned transfer must be put into effect, he [the bishop] will repeat his paternal exhortations to the pastor."

As can be seen, the steps that the bishop must take parallel the steps established for removal (chapter I). Before the issuance of the decree, there are two exhortations for the pastor. As with removal, these invitations have a time limit and the answer must be expressly stated. These steps must also be followed in the proposal for the transfer, although in the absence of an express indication of the law, its determination remains within the judgment of the bishop.

2. *Second exhortation of the Bishop*

The second exhortation to the pastor, in addition to indicating the severity of the intervention, and singling out respect for the person of the pastor that the law addresses, can also have an added value. The discussion of the transfer with the two pastors —in addition to offering new insights about the advisability of the transfer— is itself an additional guarantee of the objectivity with which they are attempting to act. It seems reasonable that in this new exhortation —since the consultation with the pastors affects the legality of the intervention— must make it evident that the consultation has followed the guidelines of this canon. The sense of this new exhortation is not to open a new procedural moment into which new assertions of the pastor can be inserted, without offering him, since the decision of the bishop is already settled, the opportunity of avoiding a coercive action, respecting the decision already made and leading back to the written proposal of the bishop and the favorable answer of the pastor (without the harm of having to put the investigation into the archives when all the actions would be evident, forestalling the possibility of a later appeal).

This highlights the fundamental difference that exists between removal and transfer. In the first case, a negative decision underlies the decision of the bishop —whether it is imputable or not is irrelevant to these effects— in the exercise of the parochial ministry (cf. c. 1740), and the relationship of cases in c. 1741. However, in the episcopal decision for the transfer, there is nothing but a legitimate exercise of the exclusive competence of the bishop (the free conferring of the pastoral office, cf. c. 530). In respect to this free conferral, the establishment of a procedure finds its basis in the will of the legislator. It is because of his will that the formalization of administrative acts serves as a guarantee both in the exercise of the function of governing and in the exercise of the rights of those affected by that exercise (see for the commentary on this section: n. 5. *Flexibility in the pastoral governance and the legality in the formation of administrative acts*).

1751 **§ 1. His peractis, si adhuc et parochus renuat et Episcopus putet translationem esse faciendam, hic decretum translationis ferat, statuens paroeciam, elapso praefinito tempore, esse vacaturam.**

§ 2. Hoc tempore inutiliter transacto, paroeciam vacantem declaret.

§ 1. If, when these things have been done, the parish priest still refuses and the Bishop still believes that a transfer ought to take place, the Bishop is to issue a decree of transfer stating that, when a prescribed time has elapsed, the parish shall be vacant.

§ 2. When this time has elapsed without result, he is to declare the parish vacant.

SOURCES: c. 2167

CROSS REFERENCES: cc. 19, 35.38, 128, 134, 154, 184–196, 200–203, 208–212, 220, 221, 223, 1732–1739, 1748–1750, 1747

COMMENTARY

Ángel Marzoa

1. *Issuance of the decree of transfer*

The final phase of the procedure for the transfer is set up (cf. cc. 1748–1750). Since the decision of the transfer is settled, they have exhausted the steps established by the law with the spirit of obtaining a favorable reception of the pastor to the proposal. The pastor has had the opportunity of heeding the decision of the bishop before the two exhortations were received (the first regulated in cc. 1748–1749). However, if the pastor continues to refuse, and the bishop thinks that the transfer must be made, the bishop will issue the corresponding decree. This decree is a precept in accord with c. 49, in which the bishop must oblige the pastor to transfer within a determined time limit, after which the parish will be vacant.

The decree, or at least the investigation of all the procedures, must —as a precaution against an appeal, and in order to guarantee the validity of what was enacted— expressly indicate the serious reason that led the bishop to proceed against the will of the holder of an office, in accord with c. 190 § 2.

Once the decree has been issued, if the pastor assents to the transfer, the parish is vacated *a qua* when he takes possession of the second office (c. 191 § 1). If the pastor continues refusing, the vacating of the parish will automatically come about at the end of the time limit, although the canon also establishes the need for a later declaration of the bishop.

In the first case, the transferred priest will draw remuneration corresponding to the first office until he takes canonical possession of the second (c. 191 § 2). In the second case, however, since the efficacy of the issued decree is extended only to the automatic vacating of the office *a quo*, once the time limit has expired, the cleric loses his right to the remuneration of the first office without having made himself deserving of the second office up to the point of provisionally taking possession of it.

2. *Declaration of parish vacancy*

The need is established in § 2 that, when the time limit has futilely passed, the bishop must declare the parish vacant. One is not treating of a constitutive declaration, since the efficacy of the precept is automatic, but it does have an effect of making public the accomplished fact, and —as Labandeira[1] points out— it can even be necessary for its effectiveness to proceed against a possible illegitimate retention of the office (cf. cc. 154 and 1381 § 2) which would make the new bestowing of the vacant office problematic.

3. *Recourse against the decree of transfer*

Hierarchical recourse can be lodged against a constitutive precept that orders an office vacant once the time limit has expired. That is, unless there are obstacles coming from the wider discretional powers that the bishop enjoys in the matter (cf. cc. 1732ff), and without prejudice to the new attempts for a fair solution to the problem that possibly has arisen (cf. c. 1733). The recourse will have to be preceded by the *supplicatio* (c. 1734). It must be lodged within ten days, which must be counted, not from the declaration of the vacancy of the office (c. 1751 § 2), but from the date of the decree that stipulates this vacancy (c. 1751 § 1).

In virtue of the remission that c. 1752 makes for c. 1747 (see commentary), if the pastor lodges a recourse, the bishop must not proceed to the provision for the parish *a qua* until the recourse has been resolved.

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1. E. LABANDEIRA, commentary on c. 1751, in *CIC Pamplona*.

1752 **In causis translationis applicentur praescripta canonis 1747, servata aequitate canonica et prae oculis habita salute animarum, quae in Ecclesia suprema semper lex esse debet.**

In cases of transfer, the provisions of Can. 1747 are to be applied, always observing canonical equity and keeping in mind the salvation of souls, which in the Church must always be the supreme law.

SOURCES: IVO CARNUTENSIS, *Decretum* (*PL* 162, 74); S. RAYMUNDUS DE PENAFORTE, *Summa de poenitentia et matrimoniis*, Introductio; S. THOMA DE AQUINO, *Quaestiones quodlibetales*, 12, 16, 2; PIUS PP. XII, Alloc., 24 iun. 1939 (*AAS* 31 [1939] 248); PIUS PP. XII, Alloc., 2 oct. 1944 (*AAS* 36 [1944] 288); PIUS PP. XII, Alloc., 17 oct. 1953 (*AAS* 45 [1953] 68); PAULUS PP. VI, Alloc., 8 feb. 1973 (*AAS* 65 [1973] 95–103); PAULUS PP. VI, Alloc., 17 sep. 1973; PAULUS PP. VI, Alloc., 4 feb. 1977 (*AAS* 69 [1977] 147–153)

CROSS REFERENCES: c. 1747, 1748–1751

COMMENTARY

Ángel Marzoa

Consequences of the decree of transfer

If the decree ordering the vacancy of the parish has not been effected in the allotted time period (c. 1751), there is automatically produced for the plaintiff a situation similar to that of a person removed from office (cf. c. 1745,3°). The priest ceases being the titleholder of the parish office, without which in principle —save for its having been decided upon later on by the episcopal decision— he would be nominated for a new office. From that point onward, there is the logical postponement that now takes place for c. 1747. The purpose is to emphasize an equitable exercise of authority in adopting the necessary measures for the execution (cf. c. 1751 § 2) of the decree of transfer (see commentary on c. 1747). The precautions of c. 1747 already suggest the fair solution to some possible problems, but there will have to be an evaluation of other circumstances that merit attention in the individual case.

The appeal to canonical equity must be taken here as primarily referring to what has been established immediately before. As a matter of fact, the remission of c. 1747 ends up being the equivalent to the actions

subsequent to the declaration of the vacancy of the office together with those actions which follow from the decree of removal, according to the procedure to which that norm corresponds. In principle, there cannot be an identical treatment of the situation of a pastor who has fruitfully governed his parish until now (cf. c. 1748), and the situation of another minister —though without serious fault— who has occasioned harm to souls (cf. c. 1740), and as a consequence would require more urgent attention.

However, in addition, the legislator essentially has wanted to introduce this appeal to canonical equity and to the *salus animarum*, the ultimate source of inspiration for canonical legislation, as the grand finale of the entire Code. From this second perspective, the final clause of the last canon of the Code merits a separate commentary.

Canonical equity

In the third part of the principles set up as guidelines for the task of legislative reform, it was requested that "preference be given to equity, not only in the practical application of the law which the pastors of souls have to carry out, but in the legislative formulation [of the Code] itself."[1]

In the last canon of a Code that has been the fruit of the informed work to which this principle alludes, the substance of the work of the codifier is established. It likewise conveys the task for its practical application in such a way that it has already been indicated with sufficient generality, and in the context of the relationship of the rights of all the faithful, in c. 221 § 2.

This information suggests a primary boundary mark; one is dealing with a duty from the Code that someone has to fulfil. Right away, c. 221 § 2 takes up the duty of applying with equity the norms through which the faithful person is judged. It is to that person that it must be applied. It must be pointed out, urged and imposed upon whomever this mandate affects, who in this sense is mentioned again in c. 1752 (in applying "observing..."). Although this last canon extends to all juridical actions, the need is to observe this principle.

What does it mean to apply the law with equity? It could be translated as something going beyond the criteria and juridical norms, and applicable to other situations —charity, kindness, moderation, mercy. However, do these "mollify" the law? The complete text of the inspired third principle of the task of codification suggests such an interpretation: "*In addition to* the virtue of justice, charity, moderation, benignity and moderation, must be kept in mind through the medium of which equity is actively supported ... in the practical application of the laws."[2]

1. Cf. *CIC* Preface, in *CIC Pamplona*, p. 53.
2. Ibid., pp. 53 and 55.

However, it seems that the text itself does not lead to that conclusion. If the circumstances are well understood, there is no place for a tension between strict law and mercy, between law and Gospel. Nor is it completely accurate to speak of equity as a *mollifying* application of the severity of the law. The law is law; it indicates or dictates a just matter in the context of the generality that entails legislating about abstract suppositions of fact. Now then, when that general supposition is faced with a concrete situation from the life of a determined member of the faithful in which the legislator immerses himself, he is presented with a series of individuating circumstances of fact that usually call for a contextualizing of the abstract principles in play. At times, the legislator himself offers elements for that adjustment by means of the express provision for those circumstances (the enumeration of the modifying cases for imputability at the moment of the application of the penal laws; circumstances expressly pointed out by the legislator in many places of the *CIC*, etc.).

It appears that c. 1752 tries to remind one that an adjustment is always necessary, although there is no mention made in each norm, since this method of proceeding pertains to the core of canon law, and, consequently, to "the matter of justice" in the Church. That adjustment must be given through equity, which, in the ecclesial system, is not a safety valve of security that permits displacing the search for solutions outside of the scope of the law in especially delicate suppositions, but an integral element that forms part and parcel of its own system. When the order is given to apply the law with equity to a person, he is not being invited to depart from canon law but rather to keep in mind an inescapable element, namely, that "the matter of justice" is precisely "the matter of canon law."

Equity is —according to Lombardía— "seeing justice in the case, and keeping in mind its particular circumstances, yet an observation that is permeated by the gentleness and mercy of the Church."[3] The sense is that justice must not be *contrasted* with kindness and mercy in order to obtain an equitable or fair result (a *tertium genus*, resulting from this *correction* of justice). However, it must be understood in the sense that this equitable saturation is *inherent* in the justice in the Church. Ecclesial justice contains at its very center the notion of equity, and when such a notion is removed from the concept, justice itself crumbles.

This is so because "the just matter" is due to every individual because it has been attributed to him beforehand. Moreover, precisely in the core of that act of duty —preceding the just matter and, at the same time, serving as its foundation— there is already really present mercy, kindness and charity. Consequently, if one wants to utter what is just in the concrete case, it must always be said while keeping in mind that "the individuality" of anyone belongs to him because it has been attributed to him in

3. P. LOMBARDÍA, commentary on c. 19, in *CIC Pamplona*.

virtue of a gratuitous act penetrated by kindness and mercy. Basically, it is not the law of nature that demands rights in canon law (although natural rights never can be denied, as is known), but the *lex gratiae*, the divine economy of salvation, which grants to the faithful person titles of "what is owed" indescribably above that which man could ever imagine. These titles are radically located in the dignity of the person of the faithful Christian; they proceed from the attribution of the *condicio filii*. That dignity of every member of the faithful must always be present when the law has to be applied.

For this journey, the above definition can be joined with this other one: equity is "the spirit of the Gospel in the treatment of the subjective particular situations."[4] The justice in the case and the spirit of the Gospel do not oppose each other, because justice must be permeated by that spirit in order that justice be essentially *in* the Church, that is to say, canonical or evangelical justice. However, this justice is not a species distinct from human justice, but is only different in kind. It is a type that is given from its being attributed and the title of its being owed is not only given through nature, but through the divine economy of salvation.

This being so, the adaptation of the Gospel in canonical justice must already be present in the legislative task. In that sense, justice *must be presumed* in the material nature of what has been established in the canonical norms. This is done so that at no moment can equity be confused with relativism or forestallment contrary to what has been laid out in the norms, as if each norm —which would be *in each case* foreign to equity— would have to be changed substantially in its application by a reinterpretation in terms of the circumstances. Many times the proper legislator has made mention of those individualizing circumstances in order to allay this suspicion. However, that does not detract from the necessary exercise of prudence in the application of the law.

In the moment of application, there can also occur *epikeia* (see commentary on c. 19), which must not be confused with equity. Epikeia has its place in the prudent judgment that must apply the norm to the person subject to it in such a way that, in the forum of his own conscience, he can eventually feel himself exempt from the demands of the law in a concrete case.[5] Although, in the foundation of both institutions, there is discerned a certain parallelism arrived at through the necessity of taking care of circumstances not contemplated in the hypothetical norm, that subjective and internal application is not equity. Equity must be present in the act of the application (the act of executive authority, of the judge or of a particular person at the time of recognizing the right of another). It must always be exercised with that external dimension which is essential to the law. So

4. E. LABANDEIRA, commentary on c. 1752, in *CIC Pamplona*.
5. "Quod est aequitas in auctoritate publica, est epikeia in privatis": E. FERNÁNDEZ REGATILLO, *Institutiones Iuris Canonici*, vol I (Santander 1961), p.86.

much is this so that epikeia will never be alleged in a juridical situation of the external forum, and on the other hand, equity or the lack of it will be.

Therefore, beyond what can be considered the vicissitudes of its historical concept,[6] equity means treating the individual person of the Christian faithful "evangelically," in conformity with the dignity and liberty that belong to him as a child of God. He has assumed the dignity that belongs to a title the price of which has already been satisfied.

In fact, canon law cannot be considered as an organization of the social order, but, disregarding the identifying characteristics of that "society," it preaches that order, namely, the people of God. Those belonging to this group are recipients of the economy of salvation, who are called to be saved and who voluntarily answer that call. They answer —they welcome it, they are "recreated" through it— without being deformed. They are incorporated into that salvation which is offered to them in the bosom in which that salvation has been offered, namely, in the Church, in the community of the redeemed, who have been called to be saved and called to salvation.

Here the connection with the appeal to the *salus animarum* appears as the supreme law of the Church with which the legislator wishes to conclude the *CIC*: *Salus animarum, suprema semper lex esse debet.*

"The juridical order of the church, her laws and precepts, as the rights and duties which flow from it, *must be in harmony* with the supernatural end. Because, in the mystery of the Church, the law has the character of a sacrament or sign of the supernatural life of the faithful, it impresses upon the Church its mark and it promotes the Church. It is certain that not all the juridical norms are given directly to foster the search for the supernatural end or in order to have preference for pastoral care, but it is necessary for them to be *in harmony* with the supernatural end of men."[7]

It should not be necessary to comment any further upon the sense of this appeal to the *salus animarum*, which expresses the necessity of always seeking the *conformity*, the *harmony* of the aforesaid law or the law applied toward the supernatural end (*salus*) to which men are called. There is a harmony in the sense that, in order that they might truly be the law of the Church, the norm and its application cannot avoid being what they are: a living canon law, which must be a realization (in some way "of a sacrament or sign of the supernatural life of the faithful, which impresses upon them its mark and fosters it" (*in his terris* of the *salus animarum*).

The fact of the matter is that the economy of salvation implies bonds, relationships, rights, duties, requirements, and orders on the earth. Some of these have the strict specificity of the juridical (they are resolved

6. Cf. A. VAN HOVE, *De legibus ecclesiasticis* (Mechelen–Rome 1930), pp. 274–304.
7. *Principles*, 3 (italics mine).

in terms of right/debt); to that end the law is the executor of the *salus animarum.* Nevertheless, it is so indirectly. That is to say, as a need for strict justice the right cannot never have an efficacy directly "sanctifying." It does so only indirectly, insofar as it protects, guarantees and claims a common good in the bosom of which there may be possible the satisfaction of the necessities related with the *salus.*

Let us now try to deduce the juridical-canonical potentialities of the classic expression embraced in c. 1752: "The salvation of souls must always be the supreme law of the Church." What does "supreme law" mean? Here one is not treating a kind of great constitutional or fundamental norm, culmination or apex of the entire canonical ordinance. Instead, the law must be understood as the desire, the ultimate aspiration, in the sense that any juridical reality (right, norm, structure, institution, etc.), will be meant as well as justification in the measure in which it is inspired and projected toward the "salvation of souls."

Can it be said that the *salus animarum* is the objective of canon law? Certainly, on the condition that we come to an agreement about the sense of the word "end." One cannot hold on to the sense of the immediate objective: that would attribute to canon law a transcendence that does not belong to it, and in which therefore it could not keep its own identity. On the other hand, it would become a means, strictly inadequate, toward the proposed objective. Of course, at certain times the matters of the Code have been able to be understood in this way, its consequences have had a high cost. The movement against legalism is not always lacking in "reasons." The *salus animarum* is the objective; but it is a *mediate* end, that is to say, an ideal which canon law wants to serve by means of the pursuance of the end that is proper to it: the *ordinatio ad bonum commune.*

What is the common good? Hervada defines it with clarity: "The common good of the Church is *the total of the conditions* for the life of the People of God, *that make it possible so* that one can reach with fullness and ease the use of the necessary and essential means for salvation and for sanctity. He can do this in such a way that there is an attainment of the apostolic mission of the faithful and the pastoral mission of the hierarchy. All of these ends are to be accomplished according to the paths pointed out through the action of the Holy Spirit."[8]

Thus, for canon law, the *salus animarum* is the supreme and ultimate objective. It is that to which the law aspires by means of its proper and immediate ends. That supreme objective does not function as the "limiting clause," without more—although without doubt it is— but also as an informing and ordained principle. The *salus animarum* acts, in

8. J. HERVADA, *Coloquios propedéuticos de Derecho Canónico* (Pamplona 1990), p. 147 (italics mine).

truth, as the extrinsic limit to the law, that is to say, as a metajuridical criterion that enters into play —denying or invalidating— when an assumed juridical norm or its interpretation are directly opposed (a juridical norm would not be valid, for example, when its content would imply sin or would lead to it). However, the *salus animarum* is also something inherent in the proper law. It is a "positive orientation" of the juridical. The *salus* also acts like an internal informing principle, involved juridically. A law is canonical, for example, in the measure in which it promotes and protects ("not all the juridical norms are given directly in order to promote the search for the supernatural end...") that which is necessary —or essential or constitutes one of the possible ways— in order to reach the *salus*, and because it does not constitute that if it stands in the way of this object.

Canon law can only be understood from the consideration of the Church in the world, and, consequently, from the understanding of its *specific end* insofar as it is presented as a society (*compago visibilis his in terris: LG* 8). From this perspective, there are presented, in the order of the objectives (of the Church), two orders which it is essential to differentiate: *a)* the promotion and protection of the ecclesiastical common good, which is where canon law meets its immediate referral; and *b)* the sanctification or the salvation of souls. The promotion and protection of the ecclesial common good only makes sense if it is understood in the order of the realization and attainment of the *salus animarum*. This is so insofar as it is a previous and necessary "condition" for that. This comes about in a way that does not affect sanctification *in recto*. Thus, the law, seeking the common welfare —*ordinatio ad bonum commune*— as a situation in which what is given is the possession of the means which lead to sanctity, it remains, as it were, in the shadow of the *salus*, making possible in what is proper to it (the matter of justice) which that *salus* brings to souls. That means that the ordering for the *salus animarum* —this being, as a desire ensconced in canon law and delineated with respect to secular law— does not deny to law its own nature, or the affirmation of its proper objective, which is always inspired and *justified* (with rationality) through the objective which transcends it, but which, in its turn, fulfills its reason for being.

To conceive the finality of the law from *the* objective of the Church (*salus animarum in Ecclesia suprema semper lex esse debet*) demands taking these essentials into consideration. To give to the terms *law* or *objective* a similar meaning is not beneficial to the Church, nor is it beneficial to the law that would thereby be relegated to a metajuridical level. Therefore, the law would be bereft of its nature and the function of the Church would become incomprehensible.

In short, the law has as its immediate objective the common good of the people of God, which in its turn makes it possible to enjoy fully and easily —by means of the right disposition of the behaviors and dynamism of social life— the necessary and desirable means for salvation and for

sanctity. The result is that the immediate objective of law must be that it is informed, always through the *salus animarum*, the ultimate application for the reasonableness of the canonical norms, the supreme ordering, *suprema lex*,[9] according to the classic expression with which the *CIC*, in its final incidental clause wishes to honor and fulfill —beyond the canon which contains it— the entire sense of canon law.

9. Cf. J. HERVADA, *El Ordenamiento canónico*, I, *Aspectos centrales de la construcción del concepto* (Pamplona 1966), pp. 186–233.